Supreme Court of the United States

OCTOBER TERM, 1967

Office-Supreme Court, U.S.
FILED
DEC 30 1967
JOHN F. DAVIS, CLERK

No. 977

BARRY WYNN, CHARLES McCRAY, EVERETT LeROI JONES, JOHN WILLIAM SMITH, GEORGE JOHNSON, ALEXANDER HOLLOWAY, ELBERT ODOM, WALTER ROGER SPELLER, WOODROW A. HOWARD, CHARLES NATHANIEL VAN DER VEER, CHARLES TOOMER, REVEREND HORACE SHARPER, REVEREND JAMES W. PARROTT,

Appellants,

—against—

BRENDAN T. BYRNE, as Prosecutor for the County of Essex, State of New Jersey,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

JURISDICTIONAL STATEMENT

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BRENDAN T. BYRNE, as Prosecutor for the County of Essex, State of New Jersey,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

JURISDICTIONAL STATEMENT

The Opinion Below

The statutory three judge Federal District Court on October 10, 1967 entered an order providing "that the ap-

plication for a temporary stay of the State court proceedings is denied. All other proceedings in this case will be stayed until after the final conclusion of said State court proceedings". The order is unreported and is set forth in full as Appendix A to this Statement.

Statement of the Grounds on Which the Jurisdiction of This Court is Invoked

On September 22, 1967, appellants instituted a plenary federal class action pursuant to 42 U.S.C. § 1983 seeking a declaratory judgment declaring unconstitutional N.J. S.A. 2A:73-3, prescribing the Grand Jurors' Oath, and seeking an injunction against the state criminal prosecutions pending against members of appellants' class because of the wholesale denial of federal constitutional rights surrounding the prosecutions. The specific rights allegedly denied in that prosecutive program are:

A. The grand juries that indicted appellants were unconstitutionally selected in that certain classes specifically —Negroes, women, residents of the city of Newark and members of lower economic classes are grossly under-represented.

B. The grand jury did not afford appellants a full and fair consideration of the charges against them.

C. The grand jurors' oath violates the First and Fourteenth Amendments to the United States Constitution.

D. Massive adverse publicity emanating from the executive and the judicial branches of the government of New Jersey denied appellants an impartial grand jury, has denied and is continuing to deny appellants an impartial trial by jury.

E. The petit juries were unconstitutionally selected in that the classes referred to above were excluded and are under-represented.

F. The prosecutive program, initiated by a wholesale selective enforcement by police during the disturbances directed against Negroes as a class is being continued by the appellee.

G. The impact of the massive selective enforcement combined with the unconstitutional massive prosecutive program has an intimidating and "chilling effect" on the appellant Negro cummunity which has deterred the exercise of First Amendment rights.

On September 22, 1967, appellee was ordered to show cause on October 6, 1967, why the relief prayed for should not be granted, and a three-judge Federal District Court was convened. On October 2, 1967, appellants obtained an order for leave to take depositions. On October 3, 1967, the deposition of appellee Byrne was taken. On October 4, 1967, the Court ordered that depositions taken during the first 20 days be limited to appellee; subpoenas issued pursuant to the order of October 2, 1967, were quashed.

On October 6, 1967, a hearing was held before the three-judge Federal District Court in which appellants sought declaratory relief voiding the oath, and a preliminary injunction of the state criminal prosecutions. Appellants introduced certain magazines and newspaper articles, plaintiffs' Exhibits 1 through 9, and filed a supplemental memorandum and additional affidavits. No oral testimony was taken; the court cancelled subpoenaes. (See Transcript of Hearing on October 6, 1967, page 17 *et seq.*).

On October 10, 1967, the three-judge Court denied the application for a temporary stay of state court proceedings, and stayed all other proceedings in this case "until after the final conclusion of said state court proceedings." The Court's order is set forth in Appendix B.

2. The judgment and order sought to be reviewed is the judgment and order entered by the Three-Judge Federal District Court on October 10, 1967. A notice of appeal to this Court was duly filed with the Clerk of the United States District Court for the District of New Jersey on October 20, 1967. Appellants applied for a stay of the criminal prosecutions pending appeal, for a stay of the Court's order of October 10, 1967, and for an order permitting appellants to take depositions. On November 1, 1967, the application for stay pending appeal was denied. An extension of time until December 30, 1967, to file this Jurisditional Statement was duly entered by this Court.

3. Jurisdiction of the appeal is conferred on this Court by Title 28 U.S.C. §1253.

4. Cases sustaining the jurisdiction of the Court are: *Cameron* v. *Johnson,* 381 U. S. 741; *Dombrowski* v. *Pfister,* 380 U. S. 479; *Bailey* v. *Patterson,* 369 U. S. 31; *Turner* v. *City of Memphis,* 369 U. S. 350; *Baggett* v. *Bullitt,* 377 U. S. 360; *Anderson* v. *Martin,* 375 U. S. 399; *Louisiana* v. *N.A.A.C.P.,* 366 U. S. 293; *Keyishian* v. *Board of Regents,* 385 U. S. 589; *Elfbrandt* v. *Russell,* 384 U. S. 11; *Zwickler* v. *Koota,* 36 U. S. L. W. 4041.

5. The validity of N.J.S.A. 2A:73-3 is here involved. The text of that statute is:

Oath of foreman; acting foreman; grand jurors.

To the foreman and acting foreman of the grand jury there shall be administered the following oath:

> "You as foreman (acting foreman) of this grand inquest to sit in behalf of the State of New Jersey in and for the County of ———— do solemnly swear that you will support the Constitution of the

United States and the Constitution of this State; that you do not believe in, advocate or advise the use of force or violence or other unlawful or unconstitutional means, to overthrow or make any change in the government established in the United States or in this State; and that you are not a member of or affiliated with any organization, association, parties, group, or combination of persons, which so approves, advocates, or advises the use of such means, and that you shall diligently inquire and true presentment make of all such matters and things as shall be given you in charge, or in any way come to your knowledge touching the present service; that the counsel of the state and your own counsel you shall keep secret; that you shall present none through envy, hatred, or malice, neither shall you leave any one unpresented for fear, favor, or affection, for reward, gain, or the hope thereof, but that you shall present all things truly as they shall come to your knowledge, according to the best of your skill and understanding so help you God."

To the grand jurors as a body there shall be administered the same oath except that the first words "you as foreman" are to be replaced with the words "you as members." As amended L. 1953, C 331, P 1879, §1; L. 1966, C 146 §1.

The federal statute involved in this case is:

42 U.S.C. § 1983—Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be sub-

jected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Questions Presented by the Appeal

1. Whether in light of *Zwickler* v. *Koota*, 36 U. S. L. W. 4041 (1967) and *Dombrowski* v. *Pfister*, 380 U. S. 479 (1954), a District Court may properly invoke the doctrine of abstention when it is alleged that a massive state prosecutorial program is founded upon and has occasioned a wholesale denial of federal constitutional rights and when the effect of said program is to intimidate and deter the Negro community from exercising its federal constitutional rights?

2. Whether in light of *Zwickler* v. *Koota*, 36 U. S. L. W. 4041 (1967), the Three-Judge District Court abused its discretion in abstaining from deciding a claim that a statute was void for "overbreadth" when appellants prayed for declaratory relief, and when virtually identical statutes have been held by the United States Supreme Court to be void for overbreadth?

Statement of Facts

On the night of July 12, 1967, John Smith, a Newark taxi-cab driver was arrested and severely injured by two Newark City police officers (Record on appeal, Exhibit P-2).

This incident ignited a series of civil disorders in Newark which lasted from July 12th-16th, 1967, and which occasioned a massive police presence composed of the

Newark police, the New Jersey National Guard, and the New Jersey State Troopers (5a,* 15a.)

A curfew imposed by Governor Hughes was applied discriminatorily against members of the Negro race; white persons on the street after the curfew were not arrested (16a).

There was massive publicity on all media throughout the disorders and subsequent thereto, much of it severely prejudicial to the Negro community (11a) (Record on appeal, Exhibits P-1-9). New Jersey Governor Richard J. Hughes appeared frequently on television and made repeated remarks highly prejudicial to appellants (11a, 12a). These included:

> The City is in "open rebellion", and constitutes a "gross injustice to a fine city and a fine mayor".
>
> "I favor their rigid prosecution." (12a)
>
> "It was plain and simple crime and not a civil rights protest." (12a)
>
> "Most of those arrested had previous criminal records." (12a)
>
> The rioters are "committing violence because they hate America." (13a)
>
> "The line between the jungle and the law might as well be drawn here as well as any place in America." (13a)

The Grand Juries

On July 17, 1967, the Essex County 15th and 16th Grand Juries commenced sitting on cases arising from the disturbances (9a). It was reported that Governor Hughes

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* Reference hereinafter by "a" is to the Appendix annexed hereto.

and State Attorney General Sills would urge appellee to propose maximum sentences for charges growing out of sniping incidents, and would ask the State Supreme Court to expedite court calendars to allow for the earliest possible processing of these cases (13a). Governor Hughes had said, "New Jersey will show its abhorence of these criminal activities, and society will protect itself by fair, speedy and retributive justice" (13a).

All of the grand jurors had taken an oath pursuant to N.J.S.A. 2A:73-3, the text of which is set forth at pages 4-5 of this Statement.

The acting Assignment Judge for Essex County issued an inflamatory charge to the grand jury stating in part:

> "The Court has requested that you appear before it this morning to be charged and instructed relative to the many killings, serious injuries inflicted upon individuals, the burning and destruction of personal property, the plundering and looting of business establishments and general lawless and riotous conduct by many individuals. . . . There is no doubt that certain guarantees and protections cloak all citizens under the Federal and State Constitutions, but these constitutional rights were never meant to be shields for acts of criminality. They were never intended to be licenses for burning, shooting, plundering and murder. I now charge you that all criminal transgressions must be dealt with expeditiously according to law, with due process as the beacon. . . . There can be no compromise
>
> "Certain events have taken place in the City of Newark which demand your immediate attention and consideration. I do not have to remind you of the complete disregard for law and order that

has been hovering over this municipality. Facts which have come to the attention of the Court indicate a pattern of lawlessness which cannot be permitted to go unnoticed by those charged with the administration of justice." See copy of Court's charge, pages 1-2, attached to Appellants' Memorandum filed on September 22, 1967 in support of application for temporary restraining order, and motion for preliminary injunction. (11a)

On July 21, 1967, the Chief Magistrate of the Newark Municipal Court refused to allow the filing of criminal complaints by appellant Smith against the white police officer who had arrested him. The decision was not based on a finding of "no probable cause," on the merits of the complaints, but on an arbitrary decision to protect the police (14a).

Commencing on July 17, 1967, and continuing through until July 27, 1967, the 15th and 16th Essex County Grand Jury's returned not less than 715 indictments against those arrested during the disturbances (9a). Appellee had announced his intention to present 100 cases a day (14a). No members of appellants class were afforded preliminary hearings to determine whether they should be held for grand jury action (51a).

Subsequent to this massive indictment program, the appellee has undertaken a program of "downgrading" the offenses to a disorderly persons under N.J.S.A. 2A:170-3. The statute in part purports to make it an offense to be "in or near any premise . . . with intent to steal. . . ." (See also, Record on appeal, Transcript of, deposition of Appellee Brendan Byrne, p. 41). As of October 18, 1967, 260 persons indicted by the 15th and 16th grand juries after July 12, were downgraded to a disorderly persons offense (94a). Forty of these have pleaded guilty (94a).

No stenographic transcript of the grand jury proceedings was taken, despite the practice of the Grand Jury in Essex County to transcribe its proceedings in matters of importance (9a).

Composition of the Grand Jury

The grand juries which indicted appellants and members of their class were unconstitutionally selected and composed, in that Negroes, women, residents of Newark, and members of the lower economic classes were excluded and discriminated against in the selection process, and because said grand juries failed to constitute a representative cross-section of the Essex County community (6a-7a).

(a) Exclusion of Negroes

Appellants' affidavits allege that Negroes comprise 29.7% of the population of Essex County (23a, 58a) but that Negroes comprise only approximately 8.8% of the grand jury master lists from January, 1966, to May, 1967 (32a-33a). The grand jury master lists are the lists from which the grand juries are selected and comprise from 125-300 names (34a). Negroes comprise approximately 6.9% of the Essex County 12th to 16th Grand Juries (34a).*

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* In the case of *State of New Jersey* v. *John William Smith* (Essex County Criminal Action Nos. 2677-66 and 2678-66), defendant, an appellant in this case, has demonstrated on a motion to dismiss the indictment that Negroes comprise approximately 25% of the Essex County population between the ages of 21-74, the statutory age for jurors, but comprised only approximately 6% of a professionally authorized statistical sample of 300 names out of the 1200 names found on the Essex County grand jury master lists for May, 1966 to May, 1967.

On the Essex County 15th and 16th Grand Juries, the grand juries, which indicted appellants, three of the forty-six jurors were Negroes (22a). The statistical likelihood due to chance alone of observing three Negroes in a group of 46 peope from Essex County is less than 3 in 10,000 (68a).

(b) Exclusion of Residents of Newark

Newark residents comprise approximately 43% of the residents of Essex County the community from which the grand juries are selected (33a). Negroes comprise 50-60% of the population of Newark (23a, 33a).

Despite this, the proportion of Newark residents on the grand jury master lists from January 1964 through May 1967, is approximately 18.62% (32a); non-Newark residents comprise 81.38% (32a).

In Essex County, the likelihood of observing 19% or less Newark residents on a grand jury venire of 300 names is less than 1 out of 100,000 (60a). Ninety-nine times out of one hundred, a venire list of 300 names should include between 103 (34.4%) and 146 (49.0%) Newark residents (61a).

The exclusion of Newark residents accomplishes an automatic exclusion of Negroes, since Negroes comprise over 50% of the Newark population (23a, 33a).

(c) Exclusion of Women

Women comprise approximately 52% of the population of Essex County (33a). The proportion of females on the grand jury master lists from January 1962 through May, 1967, is approximately 22% (33a). A study of the Essex County 12th to 16th grand juries revealed the following statistics (34a):

Female	28.7%
Male	71.3%

In Essex County the likelihood of observing 22% or less female members on a grand jury venire due to chance alone is less than 1 out of 1,000,000 (59a).

State Court Failure to Safeguard Appellants Constitutional Rights

On September 29, 1967, appellant Smith moved to dismiss the indictments in the Essex County Court (40a). Smith's attorneys had earlier moved for an extension of time to file pre-trial motions and memoranda, but this was opposed by appellee's office on the grounds that the Governor has called for "speedy justice" (40a).

On September 20, 1967, a motion to dismiss an indictment raising many of the issues in the instant case was filed by Stephen R. Bing, Esq. in the Essex County Court (72a-73a) on October 10, 1967 and it was consolidated with approximately 85 similar motions (74a).

The Assignment Judge of Essex County ordered that there would be no stay of criminal trials pending the outcome of the motion to dismiss the indictments (75a-76a). A motion for leave to appeal his ruling (78a) was denied by the Appellate Division of the Superior Court of New Jersey on October 17, 1967 (79a). The trial of the motion is still in progress and resumes on January 8, 1968.

As of October 18, 1967, there had been 30 trials with 22 judgments of conviction (83a).

The Petit Juries

The petit juries hearing appellants' cases in State courts are also constitutionally defective. An actual count of the petit jury master lists for the September 1966, and January and May, 1967, sessions, a total of approximately 14,573 names, revealed the following (66a):

Female	22.6%
Male	77.4%
Newark Residents	22.5%
Non-Newark Residents	77.5%*

The Haste of the Prosecutions

The normal waiting time between indictment and trial is 6 to 8 months (51a). Members of plaintiffs' class have been forced to trial within 3 months after their indictments (51a), this for the obvious purpose of capitalizing on the pre-trial publicity. Four Essex County Judges have been designated to hear "riot" cases and are continuously hearing cases.

The Intimidating Effect of Appellee's Prosecutions On the Negro Community

The impact of the civil disturbances and of appellee's prosecutorial program is set forth in the affidavits of five community leaders, Robert Curvin (47a-49a), James Hooper (54a-56a), Earl Harris (42a-46a), Albert Black (49a-53a), and Reverend Horace Sharper (80a-82a). In brief they state:

1. During the disturbances white law enforcement officers visited bodily harm on black citizens of Newark, but said officers were not apprehended (51a, 54a).

2. The Negro Community is aware of appellee's prosecutions of those arrested during the disturbances (42a,

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* In the case of *State* v. *John William Smith, supra,* defendant, an appellant in this case, has shown on a motion to dismiss indictments that on a professionally authorized sample of 300 out of approximately 18,000 names on the petit jury master lists for May 1966 to May 1967, only 10% are Negroes.

48a, 51a, 55a, 81a) and feels that these prosecutions are intended to intimidate the Negro Community and to deter it from exercising its constitutional rights (48a, 52a, 55a).

3. The prosecutions have served to intimidate the Negro Community, and to deter its members from exercising its constitutional rights to petition their government for redress of grievances (52a-53a, 55a-56a, 81a, 82a). The affidavit of Earl Harris states:

> "As a result of my many public activities, I have met and talked with many Negro people in Newark. I am able to state that due to the massive criminal prosecutions of Negroes arrested during the summer's disturbances there is widespread fear in the community of becoming involved in peaceful programs and demonstrations directed at problems which exist in Newark. There is also a widespread feeling that the law is being used only against the Negro Community. People have lost all confidence in the legal processes. They feel that the City and the Essex County Prosecutor are making an example of the Negro Community, showing the Community what will happen to them if they try to make known their concerns and grievances." (42a-43a)

Because of the prosecutorial program,

> "Negro citizens of the community have lost confidence in Newark's law enforcement officers knowing that said officers cannot be relied upon to offer the same kind of protection rendered to white persons in the peaceful exercise of their constitutional rights." (48a)

4. Because of the fear of retaliation by public officials, the Negro community has "appreciably refrained" from

and is more afraid to exercise its constitutional rights than it was prior to the July disturbances (45a-46a, 48a-49a, 52a, 82a).

5. There are major social problems facing the Negro community of the City of Newark (42a-45a, 55a, 82a).

POINT I

In light of this Court's opinion in *Zwickler* v. *Koota*, 36 U. S. L. W. 4041 (1967) a substantial question is presented by the abstention of the three-judge District Court from determining claims of wholesale denial of federal constitutional rights in state criminal proceedings.

A. In light of this Court's opinion in *Zwickler* v. *Koota*, 36 U. S. L. W. 4041 (1967), an important issue of the proper invocation of the doctrine of abstention is raised in this case.

Appellants, plaintiffs below, charged appellee with massive deprivation of their federal Constitutional rights. In response to this claim, the duly convened three-judge District Court denied a temporary stay of State court proceedings and issued a broad abstention order staying all further federal proceedings until the conclusion of all State court proceedings involved in this suit. The order is set forth at 1a.

This Court has recognized "the primacy of the federal judiciary in deciding questions of federal law." *Zwickler* v. *Koota, supra,* at 404. Though this recognition is tempered by the awareness that federal courts "usually should refrain from interfering with state courts enforcing local laws", *Cox* v. *Louisiana,* 348 F. 2d 750, 752 (5th Cir. 1965), the doctrine of abstention does not

"require abnegation" to state tribunals but rather should be invoked only under certain "special circumstances". *Propper* v. *Clark,* 337 U. S. 472, 492-93. Compare *Railroad Commission* v. *Pullman Co.,* 312 U. S. 496, 498-99 (1949) with *Cohens* v. *Virginia,* 19 U. S. (6 Wheat.) 264, 404 (1821). One such special circumstance is a federal suit involving an important question of state law where a federal court justifiably "would have little confidence in [its] independent judgment regarding the application of that law". *Railroad Commission* v. *Pullman Co., supra,* at 499. In the instant case, however, no question of state law is presented nor is any issue raised which would be benefited by the clarification of a state court decision. Compare *Harrison* v. *NAACP,* 360 U. S. 167 (1959) with *NAACP* v. *Button,* 371 U. S. 415 (1963).

Indeed, of pressing concern to all citizens who, from time to time, may suffer deprivation of their federal constitutional rights at the hands of local authorities, is whether, when primary federal rights are asserted, there is yet any room left for the doctrine of abstention. In *Zwickler* v. *Koota,* 36 U. S. L. W. 4041 (1967), it is reasserted that the federal courts have long-ceased "to be restrictive tribunals of fair dealing between citizens of different states" but rather have become "the *primary* and powerful reliances for vindicating every right given by the Constitution, the laws and treaties of the United States." 36 U. S. L. W. at 4042-43 quoting Frankfurther and Landis, *The Business of the Supreme Court: A Study of the Federal Judicial System* 65 (Emphasis supplied by Mr. Justice Brennan). See *United States* v. *Price,* 383 U. S. 787, 806-807 (1966).

The narrow nature of the abstention doctrine is focused on in the *Zwickler* opinion:

> "In thus expanding Federal judicial power, Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims. Plainly, escape from that duty is not permissible merely because state courts also have the solemn responsibility, equally with the federal courts, '. . . to guard, enforce, and protect every right granted or secured by the Constitution of the United States. . . .' *Robb* v. *Connally,* 111 U. S. 624, 637. 'We yet like to believe that wherever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of jurisdiction simply because the rights asserted may be adjudicated in some other forum.' *Stapleton* v. *Mitchell,* 60 F. Supp. 51, 55; see *McNeese* v. *Board of Education,* 373 U. S. at 674 n. 6." *Zwickler, supra,* at 4043; see *England* v. *State Board of Examiners,* 375 U. S. 411, 415-417 (1964).

The substance of appellants' allegations is that there exists a massive prosecutorial program, which stems from a large scale selective enforcement of the laws at the arrest level against members of appellants' class. This program has denied and is continuing to deny appellants' federal constitutional rights. The selective enforcement and prosecutions were designed to and are having the effect of intimidating the entire Negro community of the City of Newark, and of detering it from exercising its constitutional rights. Moreover, the State courts have refused to act to consider appellants' constitutional claims by refusing to stay the criminal trials pending the outcome of pre-trial motions to dismiss indictments in the state criminal courts.

Under these circumstances, where the entire Negro community is affected, it is obvious that defense in a state criminal prosecution will not suffice to avoid irreparable harm. *Cameron* v. *Johnson,* 381 U. S. 741, 755 (1965) (dissenting opinion of Mr. Justice White); see also, 381 U. S. at 749 (dissenting opinion of Mr. Justice Black). "A civil complaint asserting such an abuse of the prosecutorial function," clearly states a claim under the Civil Rights Act, 42 U.S.C. Sec. 1983; *Cox* v. *Louisiana,* 348 F. 2d at 752 (5th Cir. 1965).

In such a situation the duty of the federal courts to open their doors is intimately bound up with the thrust of the Supremacy Clause and the need of the federal courts to maintain the balance that characterizes our federal system. "When a State, under the pretext of preserving law and order uses local laws, valid on their face, to harass and punish citizens for the exercise of their constitutional rights or federally protected statutory rights, the general principle must yield to the exception: the federal system is imperilled." *Cox* v. *Louisiana,* 348 F. 2d at 752.

The need for the exercise of federal jurisdiction is highlighted in cases, like the instant one, where the damage to the appellants' is that their federal claims will be remitted to the very state court process whose constitutional abuses the appellants attack. Indeed, "there are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims." *England* v. *Louisiana Board of Medical Examiners, supra,* at 415.

For when it is asserted that the State courts themselves are failing to give "due respect" to federally protected rights, the role of the federal judiciary becomes crucial. Compare *England* v. *Louisiana Board of Medical Examiners, supra,* at 416; 42 U.S.C. §1983. It is submitted that this is precisely why the Reconstruction Congresses intended to divest state courts of any right of pre-emption in the litigation of federally protected rights and why it intended to grant federal equity relief to those deprived of their rights by any state official or institution, considerations of comity and abstention notwithstanding. See generally, Note, *The Dombrowski Remedy—Federal Injunctions Against State Court Proceedings Violative of Constitutional Rights,* 21 Rutgers L. Rev. 92 (1966).

The order of the court below, in light of this Court's decisions from *Dombrowski* v. *Pfister,* 380 U. S. 479 (1965) through *Zwickler* v. *Koota, supra,* requires reversal, if not on the merits, at least to the extent of requiring the District Court to hear and determine appellants' claim of deprivation of federal constitutional rights.

B. Appellants have raised substantial questions of federal constitutional law.

1. The oath taken by the Grand Jurors that indicted appellants pursuant to N.J.S.A. 2A:73-3 violates the First and Fourteenth Amendments to the United States Constitution.

The constitutional defects of the oath required of all New Jersey grand jurors are discussed in Point II of this Jurisdictional Statement.

2. *Appellants' rights to an impartial Grand Jury hearing and a fair and impartial trial by petit jury have been irreparably violated and continue to be jeopardized by the massive adverse publicity which has attended arrests, arraignments, and subsequent proceedings in Newark; all of which is in violation of their rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution.*

The deluge of headlines, news articles, radio reports and television programs have created an intensely prejudicial atmosphere for all persons arrested during the summer's disturbances and, moreover, have placed the stigma of criminality and un-Americanism on the entire Negro community of Newark(Record on Appeal, Exhibits 1-9).

The Governor himself lent the power of his high office to this inflammatory outpouring of prejudice with calls for "rigid prosecution" (12a) and "retributive justice" (13a). The cumulative effect of the Governor's and many other publicized statements cast all of appellants in the mold of criminality whose proper treatment is severe punishment (12a-13a).

The danger of this publicity is that even the most meritorious claims and defenses will be swept away "by an irresistible wave of public passion." *Moore* v. *Dempsey*, 261 U. S. 86, 91 (1923). Compare *Chambers* v. *Florida*, 309 U. S. 227, 336-37 (1940).

A significant line of decisions has made clear that where even the likelihood of prejudice exists, courts must act to protect the endangered litigant. *Sheppard* v. *Maxwell*, 384 U. S. 333 (1966); *Estes* v. *Texas*, 381 U. S. 532 (1965); *Turner* v. *Louisiana*, 379 U. S. 466 (1965); *Rideau* v. *Louisiana*, 373 U. S. 723 (1963); *Marshall* v. *United States*, 360 U. S. 310 (1959); *cf. Irvin* v. *Dowd*, 366 U. S. 717 (1961); and see, *Pamplin* v. *Mason*, 364 F. 2d 1 (5th Cir. 1959).

The instant case, admittedly, presents a departure from the type of prejudicial publicity cases this Court has dealt with in the past. Herein the massive publicity has not focused on a single person or small group of persons but rather has cast a shadow on a large group of appellants' class. It is submitted, however, that this distinguishing feature only heightens the gravity of the situation and makes plainer the need for federal relief to rectify the damage done to federal rights.

It is "neither right, nor in harmony with the Constitution" to force any of the appellants to "stand trial while the damaging effects of all that hostile publicity may reasonably be thought not to have been erased from the public mind." *Delany* v. *United States*, 199 F. 2d 107 (1st Cir. 1952).

3. Negroes, women, members of lower economic classes, and certain urban communities are under-represented on the grand and petit jury lists of the courts of Essex County which lists fail to mirror a representative cross-section of the community in violation of the Fifth and Fourteenth Amendments.

Appellants' affidavits allege that Negroes comprise 29.7% of the population of Essex County (23a), but that Negroes comprise only approximately 8.8% of the grand jury master lists from January, 1966, to May, 1967 (32a-33a). These master lists are the lists from which the grand juries are selected. Further Negroes comprise approximately 6.9% of the Essex County 12th to 16th Grand Juries (34a).*

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* In the case of *State of New Jersey* v. *John William Smith* (Essex County Criminal Action Nos. 2677-66 and 2678-66), defendant, an appellant in this case, has demonstrated on a motion to dismiss the indictment that Negroes comprise approximately 25% of the Essex County population between the age of 21 and 74, the statutory age for jurors, but comprise only approximately 6% of a professional authorized statistical sample of 300 out of the 1200 names found on the Essex County grand jury master lists for May, 1966, September, 1966, January, 1967, and May, 1967.

These figures show a greater under-representation of Negroes on the Essex County Grand Jury roles than that declared unconstitutional in recent decisions of this Court. This Court has upheld constitutional attacks where the disparity was 27.1%-9.3%, *Whitus* v. *Georgia,* 385 U. S. 545 (1967) (Grand Jury), and 24.4%-9.8%, *Sims* v. *Georgia,* 385 U. S. 538 (1967) (petit jury). In *Swain* v. *Alabama,* 380 U. S. 202 (1965), where the constitutionality of the petit jury composition was sustained, the proven disparity between 26% Negroes in the population and 10% Negroes on the jury roles was substantially less than that in *Whitus, Sims,* or in the instant case.

This Court has long recognized that a jury system which fails to develop a cross-section of "all the economic, social, religious, racial, political and geographical groups of the community," *Thiel* v. *Southern Pacific Co.,* 328 U. S. 317, 220 (1946) is constitutionally defective. To disregard this defect—which infects "the very heart of the jury system"—opens "the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury." *Ibid.*

Prevention of discrimination which "not only violates our Constitution but is at war with our basic concepts of a democrtic society and a representative government," *Smith* v. *Texas,* 311 U. S. 128, 130 (1940), has been deemed so fundamental that one need not be a member of the excluded class to raise the issue of discrimination. *Rabinowitz* v. *United States,* 366 F. 2d 34 (5th Cir. 1966); *State* v. *Madison,* 240 Md. 121, 213 A. 2d 475 (1965); *Allen* v. *State,* 110 Ga. App. 56, 137 S. E. 2d 711 (1964).

Appellants stand ready to prove before the District Court that the Essex County juror system has unconstitutionally discriminated against Negroes, against women, *Ballard* v. *United States,* 329 U. S. 187 (1946); *White* v.

Crook, 251 F. Supp. 401 (M. D. Ala. 1966), against members of lower economic groups, *Thiel* v. *Southern Pacific Co., supra; Labat* v. *Bennett*, 365 F. 2d 698 (5th Cir. 1966), and against residents of certain geographical areas, namely, the several predominately Negro-populated districts and wards of Essex County and the City of Newark.

The appellants have, in addition, employed and, if granted the opportunity, will further apply the science of statistics to show that the probability of obtaining the existing composition of the Essex County grand juries, grand jury master lists, petit juries and petit jury master lists is exceedingly small (57a-61a). This Court has recently taken note of the valid use of statistics in jury exclusion cases. *Whitus* v. *Georgia, supra,* at 552, n. 2. See *Finkelstein, The Application of Statistical Decision Theory to the Jury Discrimination Cases,* 80 Harv. L. Rev. 338 (1966).

It need only be added that under-representation on jury roles significantly contributes to the massive deprivation of federal rights suffered by appellants. Such discrimination further enforces the conclusion that appellants are being forced accept to less than full participation in democratic government. Federal relief is necessary to end once and for all this persistent evil. Compare *Bokulich* v. *Jury Commissioner of Green County, Alabama* (N. D. Ala. Civ. Action 66562 W (1967).

4. The grand jury procedure which resulted in indictments of members of appellant's class did not afford appellants due process of law.

From Monday, July 17, 1967, through Thursday, July 27, 1967, the Fifteenth and Sixteenth grand juries for the 1966 term in Essex County found and returned not less than 715 indictments against appellants (9a).

The appellee had publicly announced target quotas to be returned by the grand jurors (14a). The whole indictment process was characterized by such precipitous presentation of charges that there was hardly the opportunity for the jurors to fairly and impartially determine the issue of probable cause (9a). It cannot seriously be contended that "the most valuable function of the Grand Jury . . . to stand between the prosecutor and the accused, and to determine whether the charge was founded upon credible testimony or was dictated by malice or personal ill will was realized. *Hale* v. *Henkel,* 201 U. S. 43, 59 (1906); *Moore* v. *Dempsey,* 261 U. S. 86 (1923).

This Court has recognized that there is a "federal constitutional right to a fair and impartial grand jury". *Cassell* v. *Texas,* 339 U. S. 282 (1950), and, to protect this right, has spoken of "the continuing necessity that prosecutors and courts alike be 'alert to repress' any abuses of the investigatory power of the grand jury. *Hoffman* v. *United States,* 341 U. S. 479, 485 (1951).

It is true that the opinion in *Beck* v. *Washington,* 369 U. S. 541 (1962) purported to leave open the question whether, once having chosen to use the Grand Jury procedure, a state must see that that procedure comports with due process of law. However, it is submitted that this Court has already ruled on the issue, see *Cassell* v. *Texas, supra,* and that the only task remaining is to give legal recognition to the reality that "racial discrimination is only one aspect of the grand jury problem". *Beck* v. *Washington, supra,* at 580 (Dissenting opinion of Mr. Justice Douglas). Compare *Beck* v. *Washington, supra,* at 558-79 (Dissenting opinion of Mr. Justice Black, concurred in by Chief Justice Warren) with N.J.S.A. 2A:73-3.

5. The prosecutive program, and in fact the whole panoply of criminal laws and their administration, is being applied and enforced selectively and discriminatorily against appellants.

The appellants have been singled out and subjected to special, harsh, and unconstitutional treatment by appellee and the process of law enforcement in which he plays a fundamental role.

At the arrest level, in the wake of massive violence visited on the Negro community of Newark, Negroes were arrested and jailed by the hundreds while no arrests (or, at most, only token arrests) of white citizens were recorded (15a). At least twenty-three Negroes were killed during the disturbances (15a); yet no indictments have been returned as a result of killings (15a, 51a).

A curfew was imposed on the entire city of Newark during July 12-16, 1967, pursuant to N.J.S.A. App. A:9-49, and Negro citizens were arrested and charged with its violation (16a). Yet, appellants have alleged, white citizens were allowed to violate this curfew and even to engage in acts of harassment and violence, during curfew hours, directed at the Negro community (16a).

The selective use of the criminal process is highlighted by the fact that the Chief Magistrate of the City of Newark publicly stated his refusal to accept criminal complaints by Negroes directed at the alleged illegal conduct of the Newark police (14a).

Moreover, selective enforcement of the laws characterized the totality of the circumstances hereinbefore delineated—jury discrimination, unfair grand jury proceedings, and an entire criminal process conducted beneath the dark cloud of bias and prejudice.

Such utilization of an entire legal system against a specific class of citizens certainly is at war with "government by clearly defined laws, but rather [permits] government by the moment-to-moment opinions of a policeman on his beat. Compare *Yick Wo* v. *Hopkins,* 118 U. S. 356, 369-370." *Cox* v. *Louisiana,* 379 U. S. 559, 579 (1965) (Concurring opinion of Mr. Justice Black).

It is asserted that the vast majority of the Negro citizens of the City of Newark are law-abiding persons who nevertheless have serious complaints against the administration of justice, the administration of the laws, their economic deprivation, and the inadequacy of numerous public services relating to schools, housing, and police conduct. Appellants allege that the impact of the prosecutorial program of appellee is designed to and/or has the effect of deterring the Negro community from engaging in a zone of activity which is constitutionally protected, because they are fearful of becoming the victims of the unconstitutional and discriminatory law enforcement processes described above. They contend, therefore, that the very administration of the laws in the County of Essex has the effect of creating a chill upon the exercise of rights protected by the First and Fourteenth Amendments. See *Dombrowski* v. *Pfister, supra.*

On the basis of this allegation appellants contend that the selective enforcement of the laws to which they have been and continue to be subjected itself justifies and requires federal equity relief.

It has been held that the utilization of a facially unconstitutional statute to create a chilling effect on the exercise of federally protected rights establishes the basis for injunctive relief. *Dombrowski* v. *Pfister, supra.* In *Cox* v. *Louisiana,* 377 U. S. 536 (1965), this court stated that where the fact of selective enforcement of a statute is

proven, "the situation is thus the same as if the statute itself expressly provided" that protected activity only be engaged in "in the unbridled discretion of the local officials. The pervasive restraint of freedom of discussion by the practice of the authorities under the statute is not any less effective than a statute expressly permitting such selective enforcement." *Cox* v. *Louisiana*, 379 U. S. 536, 557. In such a situation, administration of the law, itself, becomes "censorship in a most odious form, unconstitutional under the First and Fourteenth Amendments." *Id.* at 581 (Concurring opinion of Mr. Justice Black.)

Selective enforcement of a statute, therefore, must be deemed to compel the same legal conclusion as that produced by consideration of a facially unconstitutional statute. Federal equity relief is appropriate to remedy the violation of federal rights. And, where selective enforcement flows not from a single statute but from an entire pattern of prosecution as in the instant case, the power of the federal courts being broad and effective cannot be withheld from curing the massive harm done to appellants.

6. The allegation of constitutional defects in the legal process which touches appellants requires a hearing as to whether the irreparable harm suffered necessitates federal injunctive relief.

The great potential harm implicit in appellants' claim is that the confidence of an entire class of American citizens in the democratic efficacy of the legal process will be totally destroyed. For all the reasons stated herein, the Negro community in Newark, with much justification, must be understood to feel that their invaluable constitutional and human rights are accorded little respect by the system of laws to which they are subject. Indeed the maximum effect to chill the exercise of constitutional

rights has been and continues to be engineered. It is as if once and for all the appellee and the system of which he is a part is going to teach the members of the Negro community a lesson—that their societal role is inevitably that of second-class citizens.

Appellants have alleged a "danger of irreparable injury 'both great and immediate'" which justifies federal equity intervention even under *Douglas* v. *City of Jeanette,* 319 U. S. 157, 164 (1943). The injury being done to appellants' class in no sense resembles that injury "incidental to every criminal proceeding brought lawfully and in good faith". *Id.* at 164. Rather the instant case presents a situation where, "the chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure." *Dombrowski* v. *Pfister, supra.* Indeed, in each of the many unconstitutional aspects of the administration of laws directed at appellants, it is apparent that appellee's prosecutions cannot successfully stand the constitutional test.

There is no need for appellants to question the good faith adherance to the Supremacy Clause by New Jersey's appellate tribunals. In the face of the assertion of grave and wholesale violations of primary federal rights, the federal courts "have not the right to decline the exercise of . . . jurisdiction simply because the rights asserted may be adjudicated in some other forum." *Zwickler* v. *Koota, supra,* at 4043; *Cox* v. *Louisiana,* 348 F. 2d 750 (5 Cir. 1965). Moreover, it is urged that the massive character of the deprivation of rights cannot be properly treated, in a piecemeal and time-consuming fashion, by the state courts. An entire pattern of prosecutions is herein attacked and only a single, powerful directive from a fed-

eral court will be sufficient to force appellee to conform his operations to the Constitution of the United States.*

POINT II

The action of the three-judge Federal District Court in abstaining from acting on a prayer for declaratory relief on a statute unconstitutional on its face contravenes the decision of this Court in *Zwickler* v. *Koota*, 36 U. S. L. W. 4041 (1967).

The oath taken by the Essex County grand juries set forth in N.J.S.A. 2A:73-3 provides:

> "You . . . do solemnly swear . . . that you do not believe in, advocate, or advise the use of force, or violence or other unlawful or unconstitutional means, to overthrow or make any change in the government established in the United States or in this state; and that you are not a member of or affiliated with any organization, association, parties, group, or combination of persons, which so approves or advises the use of such means . . ."

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* In *Bokulich* v. *Jury Commissioner of Green County, Alabama*, N. D. Ala. Civ Action 66562W (N. D. Ala. 1967), a federal District Court enjoined a state criminal proceeding where the complaint alleged as here, the systematic exclusion of Negroes from the grand jury. The Court there additionally ordered a hearing on a motion for a preliminary injunction on the issue of discriminatory selection of grand jurors. Here, however, the issue is more compelling, for what is at stake is not just one prosecution, but hundreds; not only is jury selection involved but numerous other issues: impartial determination by grand jurors, the atmosphere of prejudice at indictment and trial, and the return of indictments by unconstitutionally sworn grand jurors.

Recent decisions of this Court, *Elfbrandt* v. *Russell*, 384 U. S. 11 (1966); *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967), and *Whitehill* v. *Elkins*, 36 U. S. L. W. 4006 (1967), clearly demonstrate that the grand jury oath suffers from impermissible overbreadth, and is an abridgement of freedom of speech and association in violation of the First and Fourteenth Amendment to the Constitution of the United States.*

In *Zwickler* v. *Koota*, *supra*, the appellant sought declaratory and injunctive relief against prosecutions under

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* It is clear that appellants need not be members of the class of persons who might be excluded from jury service by the oath in order to have standing to challenge its constitutionality.

In *Schowgurow* v. *State*, 240 Md. 121, 213 A. 2d 475 (1965), the Maryland Court of Appeals dismissed an indictment because a provision in the State's Constitution which required demonstration of a belief in the existence of God as a qualification for service as a grand juror violated the United States Constitution. Although *Schowgurow* was a Buddhist, and therefore clearly a member of the excluded class, in a subsequent case, *State* v. *Madison*, 240 Md. 265, 213 A. 2d 880, the Court held the *Schowgurow* decision applicable to a defendant who believed in God. Compare *Elfbrandt* v. *Russell*, *supra*.

In *Allen* v. *State*, *supra*, it was held that a white defendant could raise the issue of exclusion of jurors. See also *Rabinowitz* v. *United States*, *supra*.

Appellants further submit that the underlying rationale of the Supreme Court in the "jury cases" is that one cannot be indicted or tried by a jury that labors under a constitutional infirmity. *Cf. Whitus* v. *Georgia*, 385 U. S. 545 (1967); *Hernandez* v. *Texas*, 347 U. S. 475 (1954); *Cassell* v. *Texas*, 339 U. S. 282 (1950); *Thiel* v. *Southern Pacific Co.*, *supra*; *Ballard* v. *United States*, *supra*. Therefore, since the grand juries were sworn to an unconstitutional oath, they are unconstitutionally tainted and any indictment or conviction which issues from them is as unconstiutionally infirm as if the constitutional taint consisted of the exclusion of a class.

a New York statute in a federal action on the grounds that the statute, on its face, suffered from impermissible overbreadth, and violated the First and Fourteenth Amendments to the Federal Constitution. A three-judge court applied the doctrine of abstention and dismissed the case.

This Court reversed, holding that where a statute is attacked as being void for "overbreadth", and declaratory relief is sought, the Federal Courts have the duty to decide the merits of the claim.

> ". . . [I]f a state statute is not fairly subject to an interpretation which will avoid or modify the federal constitutional question, it is the duty of a federal court to decide the federal question when presented to it. Any other course would impose expense and long delay upon the litigants without hope of its bearing fruit." *Zwickler, supra,* at 4044.

Citing *Dombrowski, supra,* this Court stated that "the abstention doctrine is inappropriate for cases such as the present one where . . . statutes are justifiably attacked on their face as abridging free expression . . .". *Zwickler, supra,* at 4045.

This Court held further that a request for declaratory judgment that a state statute is overbroad on its face must be considered independently of any request for injunctive relief against the enforcement of that statute. *Zwickler, supra,* at 4045.

Appellants, like the appellant in *Zwickler,* seek a declaratory judgment pursuant to the Declaratory Judgment Act, 28 U.S.C. 2201, that the oath be declared void for ovrebreadth and for violating the rights guaranteed by the First and Fourteenth Amendments to the Constitution of the United States. The District Court's abstention

in the instant case has exposed appellants to the unnecessary delay and expense in vindicating constitutional rights that *Zwickler* sought to avoid. *Zwickler* teaches that the District Court abused its discretion in abstaining in the instant case, and commands at least that the lower Court be reversed with instructions to decide the merits of appellants claim concerning the oath.

CONCLUSION

Appellants respectfully request that the Order of the three judge statutory court abstaining from deciding the claims raised by the complaint herein be reversed, and the case be remanded to the District Court with directions to grant the relief prayed for herein, or with directions to hear the claims raised and to grant such relief as is appropriate.

Respectfully submitted,

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APPENDIX A

Order of Three Judge District Court Entered on October 10, 1967

The several plaintiffs bring this as a class action against the defendant prosecutor seeking a declaratory judgment declaring a Statute of the State of New Jersey, which prescribes the language of the oath to be administered to members of a Grand Jury of a county of the State, violative of the Federal Constitution, and for an injunction restraining the defendant prosecutor from proceeding with the prosecution of any of the plaintiffs, or persons whom they purport to represent, for alleged violations of State criminal laws, charged in indictments returned by the Essex County Grand Jury, between July 17 and 27, 1967, unless normal procedures are followed by the office of the defendant and the County Grand Jury, and unless a new Grand Jury be impanelled from venire lists representative of the entire adult population of the County.

Upon the filing of the complaint in this action on September 22, 1967, and of affidavits purporting to support the allegations thereof, and in compliance with a prayer of the complaint for the constitution of a Three Judge Court, pursuant to 28 U.S.C. §2284, an order was made on September 22, 1967 directing the defendant to show cause why preliminary temporary injunctive relief should not be granted to the plaintiffs, and a Three Judge Court was duly constituted.

Upon the return of the Order to Show Cause said Court heard and considered the arguments of counsel and the

briefs and exhibits submitted in behalf of the respective parties.

It is, accordingly, on this 10th day of October, 1967, ORDERED and ADJUDGED that the application for a temporary stay of the State court proceedings is denied. All other proceedings in this case will be stayed until after the final conclusion of said State court proceedings.

/s/ GERALD MCLAUGHLIN
Circuit Judge

/s/ REYNIER J. WORTENDYKE, JR.
U. S. D. J.

/s/ ANTHONY T. AUGELLI
U. S. D. J.

APPENDIX B

Complaint

Plaintiffs allege:

1. This is a class action brought by the plaintiffs pursuant to Rule 23(a), (b) (2) of the Federal Rules of Civil Procedure on their own behalf and on behalf of all others similarly situated. Plaintiffs and other similarly situated comprise one class, and certain of these plaintiffs also bring this action on their own behalf and on behalf of all others similarly situated as Sub-Class One, pursuant to Rule 23 (c) (4) (B), F.R.C.P. Certain other plaintiffs bring this action on their own behalf and on behalf of all others similarly situated as Sub-Class Two, pursuant to Rule 23 (c) (4) (B), F.R.C.P. These two sub-classes have common claims and they therefore bring this civil action together.

2. Plaintiffs, Barry Wynn, Charles McCray, Everett LeRoi Jones, John William Smith, George Johnson, Alexander Holloway, Elbert Odom, Walter Roger Speller, Woodrow A. Howard, Charles *Nathaniel* Van Der Veer, and Charles Toomer, members of Sub-Class One, are a group of Negro citizens who were arrested on July 12, 13, 14, 15, and 16, 1967, in the City of Newark, New Jersey, and charged with indictable offenses. They are citizens of the United States. They face criminal prosecutions before the Essex County Court, Law Division, Criminal, and the Superior Court of New Jersey, Law Division, Essex County.

3. Plaintiffs, Reverend Horace Sharper and Reverend James W. Parrott, members of Sub-Class Two, are Negroes, representative of the class of all Negroes in the City of Newark. They are citizens of the United States. Said

class is currently being intimidated in the exercise of their constitutional rights through the wholesale selective and discriminatory use of the judicial machinery of the State of New Jersey to prosecute members of Sub-Class one, as hereinafter appears.

4. All plaintiffs and all others similarly situated seek an interlocutory and permanent injunction restraining the prosecution of plaintiffs Wynn, McCray, Jones, Smith, Johnson, Holloway, Odom, Speller, Howard, and Van Der Veer, and the members of Sub-Class One, under the laws of the State of New Jersey. Plaintiffs seek to enjoin these prosecutions which will arise from arrests made in the City of Newark on July 12, 13, 14, 15, and 16, 1967, and which are pending in the Essex County Court, Law Division, Criminal; the Superior Court of New Jersey, Law Division, Essex County; and/or the magistrates' courts of the City of Newark, arising from arrests made on the aforementioned dates.

5. The jurisdiction of this Court arises under the Constitution of the United States and, in particular, under the First, Fourth, Fifth, Sixth, Eighth, Thirteenth, and Fourteenth Amendments thereto, and under the laws of the United States and, in particular, Title 28 U.S.C. §§ 1331, 1343, 2201, 2202, and Title 42 U.S.C. §§ 1983.

6. The members of this class and of the two sub-classes are so numerous as to make it impractical to bring them all before this Court. Plaintiffs assert the adequate representation of all. There are questions of law and fact common to the class and the claim and defenses of the class. Plaintiffs fairly and adequately represent the interests of

these classes. The defendants have acted on grounds generally applicable to the plaintiffs and the classes. Therefore, injunctive and declaratory relief is appropriate to the class as a whole.

7. Defendant Brendan T. Byrne is the Essex County Prosecutor who is currently engaged in prosecuting plaintiffs, members of Sub-Class One, before the Essex County Court, Law Division, Criminal, and before the magistrates' courts of the City of Newark.

8. On July 12, 13, 14, 15, and 16, 1967, there were a series of disturbances in the City of Newark. Plaintiffs Wynn, McCray, Jones, Smith, Johnson, Holloway, Odom, Speller, Howard, and Van Der Veer, and members of their class were arrested during the course of those disturbances and said plaintiffs, members of Sub-Class One, were arrested and charged variously with violations of several sections of the New Jersey statutes.

9. Defendant herein, under color of law, has subjected or caused to be subjected the plaintiffs, or some of them, to the deprivation of rights, privileges and immunities secured to them by the Constitution and laws of the United States. Said deprivation of rights, privileges, and immunities has been occasioned and is threatened by the following;

A) Indictment by Grand Juries which were unconstitutionally composed;

B) Indictment by Grand Juries sworn under a statute violative of the First and Fourteenth Amendments to the United States Constitution;

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C) Indictment by Grand Juries which did not afford the plaintiffs herein a fair and impartial consideration of the charge;

D) Prejudicial pre-trial remarks by public officials, which remarks prejudiced the Grand Juries which brought the indictments and threaten the fairness of trials before the Petit Juries scheduled to try the cases;

E) The prosecutive program, in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, is being applied selectively and discriminatorily against Negroes.

A. Indictment by Grand Juries which were unconstitutionally composed.

10. Each of the Sub-Class One plaintiffs and the members of their class was indicted by votes of either the 15th or 16th Grand Juries of the 1966 Term for Essex County. Each of these Grand Juries was:

a) Improperly constituted and impaneled because systematic and deliberate discrimination against Negroes was practiced in impanelling, thus, though Negroes constitute approximately 30% of the population of Essex County, their membership in the Grand Juries which brought in the indictments here involved was 6%, a disproportion which is even greater than that condemned by the Supreme Court of the United States this year in a case arising in Georgia;

b) Improperly constituted and impaneled because systematic and deliberate discrimination against women was practiced in impanelling;

c) Improperly constituted and impaneled because systematic and deliberate discrimination against persons of the lower economic class was practiced in impanelling;

d) Improperly constituted and impaneled because systematic and deliberate discrimination against residents of certain sections of the City of Newark, to wit, the Central Ward, was practiced in impanelling;

e) Improperly constituted and impaneled because of systematic and deliberate exclusion of numerous sections of said Essex County by failure to provide a representative cross-section of the population of said County. The pattern and practice of discrimination in respect to the two Grand Juries which brought about the indictments at issue has been the consistent pattern and practice in Essex County over a long period of time.

B. Indictment by Grand Juries sworn under a statute violative of the First and Fourteenth Amendments to the Constitution of the United States.

11. All of said Grand Jurors, pursuant to N.J.S. 2A:73-3, have taken an oath of office prior to their sitting, swearing to faithfully and diligently perform their duties and also "that you do not believe in, advocate or advise the use of force, or violence or other unlawful or unconstitutional means, to overthrow or make any change in the government established in the United States or in this State; and that you are not a member of or affiliated with any organization, association, party, group or combination of persons, which so approves, advocates, or advises the use of such means".

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12. Said oath violates the First and Fourteenth Amendments to the United States Constitution, and oaths comparable thereto have been condemned by the Supreme Court of the United States.

13. Plaintiffs and members of their class are entitled to a Grand Jury which is constitutionally constituted and not constituted by standards of inclusion and exclusion violative of the Fourteenth Amendment to the Constitution of the United States.

14. In addition to the unconstitutional composition of said Grand Juries by reason of said oath, said oath created an effect of instilling in the minds and consciences of the said Grand Jurors who returned the indictments at issue here, a disregard for the Constitution of the United States, which disregard contributed to the massive and unconstitutional indictment program hereinafter complained of.

15. In addition, a portion of the unconstitutional language of the oath, i.e., "advocate, or advise the use of force, or violence or the unlawful or unconstitutional means, to overthrow or make any change in the government established in the United States or in this State", combined with the declarations of public officials with regard to the disturbances, including the Governor, who stated the disorders were "a criminal insurrection" perpetrated by those who "hate America", and the Charging Judge, who stated that the matter involved was "a pattern of lawlessness", and further compounded by the totality of unconstitutional Grand Jury proceedings described herein, substantially prejudiced the defendants by the oath's inflammatory, vague, and unconstitutional language and its effect upon the Grand Jury.

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C. Indictment by a Grand Jury which did not afford the plaintiffs herein a fair and impartial consideration of the charge.

16. Commencing Monday, July 17, 1967, and continuing until Thursday, July 27, 1967, the 15th and 16th Grand Juries for the 1966 Term for Essex County found and returned not less than 715 indictments. It is not the custom in Essex County, nor was it here the practice, for the Grand Juries to hold concurrent sessions to sit on Saturdays and Sundays, or after the close of regular business hours; therefore, on information and belief, an average of 100 matters was heard during any one of the days in question. The County Prosecutor, defendant Brendan T. Byrne, public announced target quotas for indictments to be found by the Grand Juries; his command was obeyed. On July 25, 1967, the Grand Juries returned 207 indictments, thus permitting approximately two minutes for the Grand Jurors to inquire into and deliberate upon separate crimes alleged to have been committed by the individual plaintiffs in Sub-Class One.

17. On information and belief, many indictments were returned without any testimony against the persons indicted; a deliberate policy was adopted whereby the testimony before the Grand Juries has not been transcribed and recorded despite the practice of the Grand Jury in Essex County to record and transcribe its proceedings in matters of importance; and the whole atmosphere of the presentation of the cases before the Grand Jury was one of disregard for the rights of plaintiffs and members of their class.

18. Plaintiffs submit that under the Fifth Amendment to the Constitution of the United States, as applied to the

States through the Fourteenth Amendment thereto, they have a right that, if matters relating to them are brought before a Grand Jury, any deliberations by such Grand Jury must be full and fair. Plaintiffs allege they were denied the full Grand Jury deliberation to which they are entitled under the Fifth and Fourteenth Amendments to the Constitution of the United States.

19. Subsequent to the massive program of indictments, the prosecuting officials of Essex County had no choice but to recognize that many of such indictments were obtained without evidence, but instead of dismissing all charges, have now undertaken a program of "downgrading" the offenses to disorderly persons under N.J.S.A. 2A:170-3, a statute unconstitutional on its face, and directing the persons charged therein to be tried before the magistrates' courts of the City of Newark, wherein, by reason of the prior conduct of the magistrates as hereinafter alleged, it is known that the persons charged cannot obtain a fair and impartial trial, and the effect of such "downgrading" is to bring the trial before the magistrate alone and without a jury. Moreover, the said prosecutions, whether by indictment or under the disorderly person statutes, all bear the fruits of the unconstitutional prosecutive program herein set forth. On information and belief, as of the date hereof, of the 565 pending indictments involving 801 defendants, 253 indictments involving 365 defendants are in the process of being "downgrade", all of which confirms that the initial presentation of the matters to the Grand Jury was designed to obtain indictments without regard to the propriety of prosecution, for the purpose of intimidating the Negro community of the City of Newark.

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D. Prejudicial pre-trial remarks by public officials, which remarks prejudiced the Grand Juries which brought the indictments and threaten the fairness of trials before Petit Juries scheduled to try the cases.

20. Massive publicity appearing in newspapers and magazines circulated widely in Essex County and throughout the country, along with similar extensive radio and television publicity seen and heard in Essex County and throughout the nation, created an atmosphere of prejudice and partiality which effectively denied plaintiffs and members of their class a fair hearing before a Grand Jury hastily summoned amid conditions of tension and violence, thereby denying plaintiffs due process of law under the Fourteenth Amendment to the Constitution of the United States.

21. The Judge charging the Grand Jury, far from ameliorating the effects of the prejudicial publicity, added to the existing atmosphere of prejudice and partiality, further denying plaintiffs and their class due process of law. References were made in the charge to "general lawless and riotous conduct", "a pattern of lawlessness", and "lawless acts", language similar in tone and meaning to that used by other local and state officials.

22. The Judge's failure to examine members of the said Grand Jury as to their ability to hear without prejudice or partiality the charges against the plaintiffs denied plaintiffs and members of their class due process of law.

23. Said publicity which influenced the Grand Jury to bring indictments has created and continues to create and maintain an atmosphere of prejudice and partiality which

threatens to deprive plaintiffs and members of their class a fair and impartial trial by jury and due process of law guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States.

24. The massive prejudicial publicity was evident from the outset and included the following:

a) Governor Hughes said the City of Newark was in "open rebellion" and that the disturbances constituted "a gross injustice to a fine city and a fine mayor". Asked what he thought the treatment of those arrested should be, he stated quickly, "I favor their rigid prosecution." *New York Times,* 7/15/67, 11:6.

b) The Governor said he was especially disturbed by what he said appeared to be a "holiday atmosphere" during the disturbances. "It's like laughing at a funeral", he said bitterly. *New York Times,* 7/15/67, 11:6.

c) The Governor stated that the rioting was "open insurrection" and that most of those arrested had previous criminal records. "It was plain and simple crime and not a civil rights protest." The Governor again said that the riots were not caused by a spontaneous uprising against unemployment, squalid housing and general hopelessness, as Negro leaders insist, but were an outbreak by a "vicious criminal element".

d) Governor Hughes laid the rioting entirely to the city's criminal elements and declared that "only about 3 or 4% of the city's Negro population was involved in the trouble." He said "most of those arrested had previous criminal records." *New York Times,* July 16, 1967, 54:5.

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On the day preceding the convening of the Grand Jury which indicted the plaintiffs, the Govrenor asserted, "New Jersey will show its abhorrence of these criminal activities, and society will protect itself by fair, speedy and retributive justice." *New York Times,* July 16, 54:1.

e) Governor Hughes and Attorney General Sills would urge Essex County Prosecutor Brendan T. Byrne, to propose maximum sentences for charges growing out of sniping incidents, and would ask the State Supreme Court to expedite court calendars to allow for the earliest possible processing to these cases. *New York Times,* 7/17/67, 23:2.

f) The Governor charged that many of the rioters were "committing violence because they hate America." —*NY Times,* 7/17/67, 23:3-4.

g) Governor Hughes in moments of anger had called the rioting "open rebellion", "a criminal insurrection" and an "explosion that was pathological, senseless, and un-American." *NY Times,* 7/18/67, 22:1.

h) "The line between the jungle and the law might as well be drawn here as well as any place in America." 7/20/67, 29:2 (Also quoted in *Times,* 7/16/67, 1:5).

i) Of the more than 1,000 person arrested in the 6 day Newark outbreak he said ¼ had criminal records and "many of the looters would have done it every day, if they could. They just wanted those fur coats and TV sets. They weren't upset about injustices." *Newark Star Ledger,* 7/24/67, 4:4.

25. In short the announced public policy of the Governor of New Jersey and top local officials was to prejudge

the guilt of those arrested and to seek "swift and harsh punishment". Said policy influenced and encouraged Essex County Prosecutor, defendant Brendan T. Byrne, who sought quick indictments of those arrested. "The cases are scheduled to be presented at the rate of 100 a day by assistant prosecutors working in relays." "We are moving with great dispatch," Byrne said, "because virtually all these people are in custody". Some of these cases were postponed after state troopers and police, scheduled to testify as witnesses, were called to other assignments. Defendant Byrne said, "We can't bat 1,000—the public safety has to come first". *Newark Evening News*, 7/18/67. As a result of the prejudicial statements and actions of Governor Hughes and the defendant Byrne, the Grand Jurors were adversely prejudiced toward plaintiffs' class, and plaintiffs and members of their class were denied a fair Grand Jury indictment.

26. The prejudicial pre-trial publicity regarding plaintiffs and members of their class emanated not only from the Governor and the prosecuting officials of the State of New Jersey but as well from the judicial branch of the State of New Jersey. Such prejudicial action by the judicial branch of the Government, which was given the widest publicity, included the following:

27. On July 21, 1967, the Chief Magistrate of the Newark Municipal Court refused to allow the filing of criminal complaints against white police officers by plaintiff, John Smith, a Negro cab-driver whose arrest and beating by the police ignited the July disturbances. The Court's decision was not based on a finding of "no probable cause" on the merits of the proffered complaints but on an arbitrary decision to protect the police.

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E. The prosecutive program, in violation of the equal protection clause, is being applied selectively and discriminatorily against Negroes.

28. During the period of the disturbances herein above set forth, a vast amount of criminal conduct was engaged in the City of Newark by members of the white race, including but not limited to members of the Newark Police Department, State Troopers, National Guardsmen, and other citizens of the City of Newark. As part of the result of said criminal conduct, 23 Negroes were killed and many other acts of violence were committed by members of the police and military forces against the Negro people of the City of Newark.

29. Notwithstanding the criminal conduct committed during the said disturbances by members of the white race, the entire prosecutive program by the Essex County Prosecutor has been directed against the plaintiffs and members of their class and any arrest and charge against members of the white race, if at all, has been only token in nature and has not included any arrest or charging of any person responsible for the death of 23 Negroes during that period in the City of Newark. Moreover, with respect to the numerous acts of violence committed by members of the police and military forces against the Negro community, no prosecution has been undertaken. Indeed, many of the persons who were the victims of violence by the police and military forces have themselves been charged with violence, solely to conceal the criminal conduct visited upon them by members of the police and military forces.

30. The unequal administration of the prosecutive program by defendant is a continuation of the unequal admin-

istration of the law in the City of Newark beginning with the disturbances aforesaid, as follows:

31. During the period July 12-16, 1967, there was in effect a curfew imposed by the Governor of New Jersey pursuant to N.J.S.A. App. A:9-49. The said curfew violated the rights, privileges, and immunities of all citizens of the State of New Jersey but in addition thereto the said curfew was arbitrarily and discriminatorily applied to Negroes solely on account of race and was not applied to white persons on the streets after the curfew hour. Moreover, bands of white persons lined the streets of certain neighborhoods of the City and shouted obscenities and racial epithets, and threw missiles at passing Negro persons. Law enforcement officials made no effort to stop this conduct.

32. Unless the prosecutions hereinabove referred to are restrained, plaintiffs and members of both Sub-Class One and Sub-Class Two will suffer irreparable injury in the following respects:

a) Plaintiffs and members of Sub-Class One will in massive numbers be subjected to unconstitutional prosecutions, are threatened to be burdened with long trials, prison sentences, and/or criminal records, when it is evident at the outset that any such convictions cannot be sustained and therefore the prosecutions are being conducted in bad faith and solely for the purpose of intimidating the entire Negro community of the City of Newark as hereafter set forth. Notwithstanding that no conviction under the circumstances hereinabove described can be sustained against a properly advanced constitutional attack, many of the members of Sub-Class One will not be able effectively to

appeal the same and may accordingly suffer punishment which has no constitutional validity.

b) The enormous number of indictments that have been returned by said Grand Juries, approximately 1700, have cast a tremendous burden on the legal resources of the Essex County Bar and the Public Defenders Office. Said burden is so great that counsel who have been assigned, many of whom are unfamiliar with the constitutional issues involved, have not had adequate time to fully provide all the necessary legal assistance required for the defense of the plaintiffs herein. Defendant Byrne, fully aware of the lack of preparation and fully aware of the denial of opportunity to litigate these constitutional questions in the State courts, nevertheless is insisting upon immediate trial of plaintiffs in Class One in the State courts.

c) The design of the prosecutions, particularly in their massiveness and haste, is to intimidate the entire Negro community of the City of Newark. The said prosecutions, particularly against the background of the numerous statements by members of the government of the State of New Jersey, all constitute an arbitrary and deliberate attempt on the part of public officials of the City of Newark and the State of New Jersey to extract retribution from and to retaliate against members of plaintiffs' class as representatives of the Negro residents of Newark, New Jersey, and in particular of the Central Ward, and further to intimidate members of Sub-Class Two from the exercise of their constitutionally protected rights.

33. The vast majority of the Negro citizens of the City of Newark are law-abiding persons who nevertheless have serious complaints against the administration of justice,

the administration of the laws, their economic deprivation, and the inadequacy of numerous public services relating to schools, housing, police and the like. The impact of the unconstitutional prosecutions aforesaid is designed to and has the effect of deterring the Negro community from engaging in a zone of activity which is constitutionally protected, because they are fearful of becoming the victims of the unconstitutional and discriminatory law and enforcement and prosecutive program hereinabove described, and therefore has the effect of creating a chill upon the exercise of their rights protected under the First and Fourteenth Amendments to the Constitution of the United States.

34. Plaintiffs have no adequate and available remedy in the courts of the State of New Jersey. On September 21, 1967, a motion was argued before the Assignment Judge in the County of Essex in respect to one of the members of plaintiffs' class, in which argument, among other things, there was presented to the Court a motion for a hearing in respect to some of the charges hereinabove set forth, including a contention that: (a) the indictment was by a Grand Jury which was selected under a statute violative of the First and Fourteenth Amendments to the United States Constitution and (b) that the evidence as to the racial composition of the Grand Jury which indicted the defendant in that case was sufficient as to require a hearing as to whether or not discrimination was exercised in the selection of the Grand Jury. The Court, though granting a hearing on the argument, refused to postpone the trial now set for October 2, 1967.

WHEREFORE, Plaintiffs pray for the following relief:

That a three-judge court be convened pursuant to 28 U.S.C. §§ 2281 and 2284 to hear this action, that this cause

be expedited and heard at the earliest practicable date, and that this Court:

1. Issue a declaratory judgment declaring N.J.S.A. 2A: 73-3 void on its face, null and void, as violative of the Constitution of the United States;

2. Issue a permanent injunction restraining the defendant his agents, servants and employees from:

(a) proceeding with the prosecution of any persons under any indictments returned on July 17 through 27, 1967, by the Essex County Grand Jury, on charges that the persons indicted had committed crimes against the State of New Jersey during civil disturbances in Newark, New Jersey on July 12 through 16, 1967;

(b) re-charging, re-indicting, and re-prosecuting plaintiffs in Sub-Class One and members of their class unless:

1. the procedures normally followed by the Essex County Prosecutor's office and the Grand Jury of Essex County with regard to presentation of matters to the Grand Jury and "diligent inquiry" by that body are followed, and unless,

2. a new Grand Jury be impaneled from venire lists truly representative of the entire adult population of Essex County, in the event re-indictments are sought;

(c) prosecuting or re-prosecuting plaintiffs until such time as their cases can be heard in an atmosphere free from prejudice as will afford them the full enjoyment of their constitutional right to a fair and impartial trial;

3. That pending the hearing and determination of the prayer for a permanent injunction, the court enter an in-

terlocutory injunction restraining the defendant, his agents servants and employees from engaging in any of the conduct specified in paragraphs 2(a)(b)(c)(1)(2)(d).

4. For such other relief as to this court may seem just and proper.

Respectfully submitted,

/s/ OLIVER LOFTON
OLIVER LOFTON and HARRIS DAVID
Attorneys for John William Smith
ROBERT L. CARTER and MORTON STAVIS
Attorneys for Reverend Horace Sharper and Reverend James W. Parrott

IRWIN L. FACHER and HENRY M. DISUVERO
Attorneys for George Johnson, Alexander Holloway, and Woodrow A. Howard

KEENAN AND FINCH and HENRY M. DISUVERO
Attorneys for Nathaniel Van Der Veer, Walter Roger Speller, and Elbert Odom

IRVIN B. BOOKER
Attorney for Barry Wynn, Charles McCray, Everett LeRoi Jones, and Charles Toomer

APPENDIX C

Affidavits Submitted in Support of Order to Show Cause Signed on September 22, 1967

AFFIDAVIT OF SAMUEL KOENIGSBERG
ESSEX COUNTY COURT
LAW DIVISION—CRIMINAL

INDICTMENT, No. A 2459—1966 TERM

PROSECUTOR'S FILE No. 2750-67

STATE OF NEW JERSEY,

Plaintiff,

vs.

CLARENCE SIDNEY REED,

Defendant,

CRIMINAL ACTION

STATE OF NEW JERSEY,
COUNTY OF ESSEX, } ss.:

Samuel M. Koenigsberg, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am counsel for the defendant herein, having volunteered my services for his defense. I have received no fee in this engagement and expect none. The defendant's affidavit of indigency is annexed.

2. The defendant is charged with assault and battery on a police officer. He was arraigned on or about August 18, 1967, and pleaded not guilty. The office of the Prosecutor has advised me orally, in response to a motion for a bill of particulars, that the officer was not injured, and did not report the alleged assault for medical treatment. It also advised me that officers were under instructions to report any injury, no matter how minor, to a police department physician.

3. As part of the defense, I desire to ascertain the facts with respect to the method of selecting grand and petit jurors in Essex County, and, in this connection, the facts concerning the extent of the presence or absence of Negroes on the grand jury lists of the County, and the occupational distribution of the listed individuals. This is for the purpose of enabling the defendant to ascertain whether or not, in an objective constitutional sense, discrimination has occurred in the selection of the grand jurors and petit jurors in Essex County. No reflection on any official is intended by such an inquiry, for the courts have repeatedly held that improper discrimination may occur innocently and notwithstanding proper official motives and official good will.

4. I have begun certain inquiries in this direction with the names and addresses of the members of the Fifteenth and Sixteenth Juries, 1966 Term, impaneled, as I have been informed, from the May 1967 Grand Jury list. The members of Grand Juries 15 and 16 are listed on Exhibit A annexed hereto. I have been informed, believe and state that of the 46 grand jurors on these two grand juries, only three are Negroes—Messrs. Admiral D. Wilkins and James E. Churchman, Jr. (Grand Jury 15, jurors No. 16 and 20), and Mr. Louis N. Speed (Grand Jury 16, juror No. 13).

These three negroes comprise approximately 6½% of the total of the 46 grand jurors. The defendant was indicted by Grand Jury 16, as appears from the signature of the deputy foreman on his indictment. On this grand jury the one Negro comprised approximately 4% of the jurors.

5. I have been informed by Mr. William Caffrey, Clerk of the Grand Jury, that the proportion of Negroes on these two grand juries has been approximately the prevalent one in the recent past, although there have occasionally been grand juries with three or four Negro members.

6. With respect to the proportion of the Negro population in Essex County and Newark, I communicated with Mrs. Gladys W. Ellsworth, Chief of Research and Statistics at the Bureau of Research and Statistics, Division of Economic Development, in the State Department of Conservation and Economic Development. Mrs. Ellsworth stated to me that her Bureau has made estimates of the total population and the Negro population of Essex County and of Newark for 1966. Mrs. Ellsworth emphasized to me that the 1966 figures were estimates, based upon projections from the United States Census of 1960. With respect to the Negro population estimates, she stated, these were based on the statistical assumption that the rate of growth of the Negro population in the period between the 1960 census and the present was the same as that between the 1950 and 1960 censuses.

7. Mrs. Ellsworth gave me the estimates for 1966 as follows:

	Essex County	*Newark*
Total population	954,310	398,000
Negroes	283,700	234,600
Percentage of Negroes to total population	29.7%	58.9%

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8. On an official map of Newark I have caused to be noted the locations of the 46 members of Grand Juries 15 and 16, as shown by their addresses on Exhibit A. The members of Grand Jury 15 are indicated by a circled red dot and of Grand Jury 16 by a circled green dot. Alongside each dot is indicated the grand juror's number as it appears on Exhibit A. A copy of the map is attached as Exhibit B.

9. An examination of the map depicts that of the 46 grand jurors, 11 jurors, or 24% reside in Newark, while the remainder reside in other portions of Essex County, although the estimated proportion of the population of Newark (398,000) to that of Essex County (954,310) is nearly 42%. It also discloses that only one of the 46 grand jurors (No. 20 of Grand Jury 15) reside in the so-called "ghetto" area of Newark.

10. I have consulted an official governmental publication, entitled "Census Tracts, Newark, N. J., Standard Metropolitan Statistical Area," issued by the Bureau of Census, United States Department of Commerce, and based upon the census of 1960. This volume divides the area of New wark and its environs into tracts called "Census Tracts," which contain, with a few variations, roughly 4,000 population as of 1960, and it analyzes the composition of each tract by a number of factors, including race. I am aware of no more recent publicly available analysis of this nature. The addresses of the members of Grand Juries 15 and 16 have been allocated, under my direction, as nearly as possible to their respective "census Tracts." The following tabulation shows the composition of the population of the "Census Tract" of each grand juror's residence.

Tabulation of Composition of Population of the "Census Tract" of Each Grand Juror

[PHOTOSTATS]

(Opposite) ☛

A. GRAND JURORS RESIDING IN NEWARK

Address	Data From "Census Tracts, 1960"			
	Census Tract No.	Population		
		White	Negro	Other Races
46 Barbara Street Newark	74	1886	3	-
374 Sanford Avenue Newark	20	4171	3	[illegible]
1003 South Orange Avenue Newark	20	4171	3	0
	or 21	3798	1	4
397 Bergen Street Newark	33	1838	2382	7
62 Poe Avenue Newark	20	4171	3	-
25 Manor Drive Newark	22	10943	65	136
31 Peck Avenue Newark	6	3937	48	-
112 Ferry Street	79	3926	351	-
	or 76	1971	203	-
51 Clifton Avenue Newark	90	1280	186	-
32 Montrose St., Newark	21	3798	1	4
603 Elizabeth Avenue Newark	49	4024	141	10

B. GRAND JURORS RESIDING ELSEWHERE IN ESSEX COUNTY

Grand Jury #15 Juror No.	Address	Data From "Census Tracts, 1960" Census Tract No.	Population White	Negro	Other Races
1	3 Eagle Terrace West Orange	WO-175	4862	50	4
2	95 Hemlock Road Short Hills	MI-200	5652	73	3
5	136 Darling Avenue Bloomfield	BL-149	5496	1	2
6	91 Carteret Street West Orange	WO-174	4286	10	2
7	20 Beasley Street West Orange	WO-174	4286	10	2
8	26 Evergreen Place Roseland	ER-209	4953	22	3
9	5 Whitney Place East Orange	EO-103	4172	276	3
10	55 Glenwood Avenue East Orange	EO-105	3741	712	6
11	11 Barbara Drive Fairfield	NC-216	7031	431	11
12	490 Glenwood Avenue East Orange	EO-100	3031	61	2
		or EO-101	3249	257	14
13	275 Prospect Av., E. Or.	EO-101	3249	257	14
15	23 Speir Drive South Orange	SO-190	4633	211	1
16	209 Hollywood Avenue East Orange	EO-109	804	3341	20
17	234 Eagle Rock Avenue West Orange	WO-175	4862	50	4
		or WO-176	4953	1	-

rand ry #15 / ror No.	Address	Data From "Census Tracts, 1960"			
			Population		
		Census Tract No.	White	Negro	Other Races
8	45 Woodcrest Avenue Short Hills	MI-201	3425	33	3
9	24 East Drive Livingston	LI-208	4601	15	1
1	340 Oxford Drive Short Hills	MI-200	6652	73	3
2	6 High View Road Caldwell	CD-217	6837	88	17
3	13 Exeter Road Short Hills	MI-201	3425	33	3
rand ry #26					
1	105 Harding Drive South Orange	SO-190	4633	211	1
2	75 South Ashby Avenue Livingston	LI-207	5520	3	4
3	510 Summit Avenue Maplewood	MA-195	4239	16	5
4	463 Ridgewood Avenue Glen Ridge	GR-160	8227	87	8
5	58 Continental Avenue Belleville	BE-140	3710	3	1
6	64 Elmwood Terrace West Caldwell	WC-218	8272	30	12
7	24 Harvard Street Nutley	NU-137	4830	262	6
8	53 Church Street East Bloomfield	BL-154	5388	30	11
9	1 Kensington Terrace Maplewood	MA-195	4239	16	5

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B. GRAND JURORS RESIDING ELSEWHERE IN ESSEX COUNTY (Cont'd)

Address	Data From "Census Tracts, 1960"			
		Population		
	Census Tract No.	White	Negro	Other Races
19 Royal Avenue Livingston	LI-205	5497	32	11
326 Lupine Way Short Hills	MI-203	4393	30	1
220 North Clinton St. East Orange	EO-104	3199	795	10
561 Passaic Avenue Nutley	NU-135	5198	12	4
14 Westgate Road Livingston	LI-208	4601	15	1
75 Baldwin Place Bloomfield	BL-155	3871	225	4
36 Hawthorne Place Montclair	MO-170	1924	1210	7

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11. An examination of the data discloses that of the Newark grand jurors only one (Grand Jury 15, No. 20, who is a Negro; see paragraph 4 above), lives in a predominantly Negro area. The remaining 10 Newark grand jurors come from areas which, according to the 1960 "Census Tracts," were predominantly or overwhelmingly white. The non-Newark grand jurors, except for the two Negro non-Newark jurors (Grand Jury 15, No. 16, and Grand Jury 16, No. 13), likewise come from areas which, according to the 1960 census, were overwhelmingly white.

12. The occupations of the members of Grand Juries 15 and 16, as set forth in the Grand Jury List of May 1967 on file in the office of the County Clerk, are as follows:

Juror No.	*Occupation Grand Jury 16*	*Occupation Grand Jury 15*
1	Savings & loan exec.	Eng.
2	Dist Mgr	Pres. & gen mgr
3	Engineer	Clerk
4	Sales	Supv
5	Bank Official	Asst. to Comptroller
6	President	Ins Agent
7	Retired	Clerk
8	Chemical consultant	Exec Vice Pres
9	Acctg Supv	Methods Analyst
10	Sr Ind Eng	Retired
11	Housewife	Supv

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Juror No.	*Occupation Grand Jury 16*	*Occupation Grand Jury 15*
12	Eng mgr	Mechanic
13	Collector	Rental Agent
14	Adm asst	Acct Clerk
15	Sr Correspondent	Housewife
16	Corp controller	Shipping clerk
17	Staff Asst	Housewife
18	Office work	Publisher
19	Mech eng	Vice Pres
20	Secretary	Funeral Dir
21	Engineer	Dir of Mfg
22	Dept chief	Banker
23	Secretary	Adm Engineer

13. On September 5, 1967, I conferred informally with Mr. Melvin Howie, one of the two Jury Commissioners, with respect to the method of the selection of jurors. The substance of his information to me was as follows: The selection of jurors was based 99% on the voting lists. Mr. Howie had tried to the best of his ability to secure the services of Negroes for jury service. The commissioners had been emphatically instructed to do so by the Assignment Judges. Mr. Howie had made requests some time ago to Negro personnel men at the Prudential Insurance Company and at Bamberger's and had received a few names from them. He had spoken to two Negro Magistrates on the subject. He had written to Negro clergymen but re-

ceived no answers, but he had never made personal contact with these clergymen or followed his letters with telephone calls. These matters occurred some years ago. Asked whether he made any efforts to get postal clerks onto the grand jury, he made no definite response. Asked whether any efforts had been made by him to communicate with organizations of Negro business men, he replied in the negative. He assured me repeatedly that he had made diligent efforts, but that it was very difficult to get Negroes for jury service. I asked whether I might look at his correspondence soliciting Negro membership for jury service, but he stated he preferred not to show it to me.

14. With respect to securing laborers and workers on the grand jury, Mr. Howie told me that this was difficult. He stated that he had talked to a number of union representatives but that the difference between the $5.00 daily rate paid to jurors and the workers' earnings on an hourly basis was so large that he received few, if any, leads from this source. He repeatedly emphasized to me the difficulty in enlisting individuals for jury service because of the necessary idle periods in the court house awaiting the impanelling of jurors, the feelings of frustration when a case was settled before prosecution to a verdict, and, as an overall matter, the hardship in taking the time from work or, in the case of women from their household duties and their children.

15. In the light of the facts presented on this application, the defendant requests a hearing at which there can be elicited specific testimony on the method of selecting grand and petit jurors, which has had as its end result the racial and occupational characteristics of the grand jury which indicted him. The facts here have been necessarily limited

to Grand Juries 15 and 16. The 46 individuals on Grand Juries 15 and 16 presumably comprise too small a sample for the purpose of affording conclusions on the subject under inquiry. A larger sample, and one covering some period of time, is desirable. The defendant therefore seeks copies of grand and petit jury lists from which the jurors who serve are selected.

16. By statute, N.J.S. 2A:70-3, copies of the jury lists are to be filed in the office of the County Clerk, "there to remain a public record." I have inquired of the office of the County Clerk concerning the cost of duplicates of the grand jury lists and the petit jury lists. I have been informed that the lists are voluminous, and that the charge is 3 cents per name. On this basis a single petit jury list with 3,000 names would cost $90.00. A single grand jury list, with 300 names would cost $9.00. Short of mechanically or photographically duplicating the lists, with their numerous names, addresses, and occupations, the lists would have to be copied by hand, manifestly a most cumbersome, time-consuming, error-prone, expensive, and generally unfeasible method, and even further beyond the defendant's capacity to pay.

17. In view of the indigence of the defendant, the annexed application requests that the County Clerk be directed to supply the defendant with copies of the lists therein set forth at the expense of the County.

18. Such a procedure will require some period of time for accomplishment and for an analysis and appraisal of any conclusions which the data may suggest. Accordingly, the application requests an adjournment of the trial for the purpose of such analysis and for a hearing with respect to the matters herein set forth.

SAMUEL M. KOENIGSBERG

(Sworn to September 13, 1967.)

Appendix C

Exhibit A, Annexed to Affidavit of Samuel M. Koenigsberg

[PHOTOSTAT]

(Opposite) ☛

FIFTEENTH GRAND JURY — 1966 TERM

1. JOSEPH A. SILVESTRI (Foreman)
   3 Eagle Terrace, West Orange.
2. FRANK STACKHOUSE (Dep. Foreman)
   [illegible] Road, Short Hills
3. MISS ELEANOR V. ILLIS
   46 Barbara Street, Newark
4. MISS GENE M. LaVIA
   374 Sanford Avenue, Newark
5. GERARD J. CUMMINGS
   136 Darling Avenue, Bloomfield
6. MARTIN L. KLAUSNER
   91 Carteret Street, West Orange
7. MRS. ESTELLE B. ZOROMSKI
   20 Beasley Street, West Orange
8. ARNOLD P. MEYER
   26 Evergreen Place, Roseland
9. MRS. ELIZABETH NIED
   5 Whitney Place, East Orange
10. MRS. MARTHA C. TAILLIE
    55 Glenwood Avenue, East Orange
11. EDWARD S. CZUBA
    11 Barbara Drive, Fairfield
12. WALTER G. SICKLES
    690 Glenwood Avenue, East Orange
13. MRS. ROSE GOLDSTEIN
    275 Prospect Street, East Orange
14. MISS ROSEMARY FARRELL
    1003 South Orange Avenue, Newark
15. MRS. BARBARA C. NUSSBAUM
    23 Spair Drive, South Orange
16. ADMIRAL D. WILKINSON
    209 Hollywood Avenue, East Orange
17. MRS. RUTH MAYER
    254 Eagle Rock Avenue, West Orange
18. J. STUART AUCHINCLOSS
    45 Woodcrest Avenue, Short Hills
19. ROBERT A. SCHLICHTING
    24 East Drive, Livingston
20. JAMES E. CHURCHMAN, Jr.
    397 Bergen Street, Newark
21. ALBERT R. TUCKER
    340 Oxford Drive, Short Hills
22. RAYMOND M. EVANS
    6 High View Road, Caldwell
23. HOWARD C. MILLER
    13 Exeter Road, Short Hills

June 5, 1967

September 11, 1967

SIXTEENTH GRAND JURY — 1966 TERM

1. MOE RUBENFIELD (Foreman)
   105 Harding Drive, South Orange
2. WAYNE N. UMLAND (Deputy Foreman)
   75 South Ashby Avenue, Livingston
3. JOHN G. GILL
   510 Summit Avenue, Maplewood
4. KENNETH H. WALKER
   463 Ridgewood Avenue, Glen Ridge
5. LEONARD A. BACK
   58 Continental Avenue, Belleville
6. BERNARD D. ALLEN
   64 Elenwood Terrace, West Caldwell
7. EDWIN J. REICH
   24 Harvard Street, Nutley
8. ERNEST R. HANSON
   53 Church Street East, Bloomfield
9. DONALD B. SAUNDERS
   1 Kensington Terrace, Maplewood
10. BASIL A. NAKONECHNY
    19 Royal Avenue, Livingston
11. MRS. GRACE BERTOLINO
    62 Poe Avenue, Newark
12. KENNETH G. BUCKLIN
    326 Lupine Way, Short Hills
13. LOUIS N. SPEED
    220 North Clinton Street, East Orange
14. MISS MARGARET E. MOORE
    561 Passaic Avenue, Nutley
15. MRS. ADAMINA M. ZIMMERMAN
    25 Manor Drive, Newark
16. FRANK E. KUTCHER, Jr.
    14 Westgate Road, Livingston
17. JOHN F. TOOHEY
    31 Peck Avenue, Newark
18. MISS ROSEMARIE ADAMS
    112 Ferry Street, Newark
19. VITO J. TREMATO
    75 Baldwin Place, Bloomfield
20. MISS GRACE F. ULBRICHT
    36 Hawthorne Place, Montclair
21. JOHN A. FEDOR
    51 Clifton Avenue, Newark
22. PIERCE L. BUTLER
    32 Montrose Street, Newark
23. MISS FLORENCE BLUM
    603 Elizabeth Avenue, Newark

June 6, 1967

September 11, 1967

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PAGE

Appendix C

AFFIDAVIT OF GEORGE CHARLES BRUNO

GEORGE CHARLES BRUNO, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I reside at 351 Broad Street, Newark, New Jersey. I am employed by the Newark Legal Services Project, 114 Branford Place, Newark, New Jersey, where I am serving as a Reginald Heber Smith Community Lawyer Fellow, associated with the University of Pennsylvania. I hold the degree of Bachelor of Laws from the National Law Center of the George Washington University, which I have received this month.

2. For the past several weeks I have been engaged in examining the Grand Jury Lists in the Office of the County Clerk of Essex County. In certain aspects of the work I was assisted by Miss Joyce Bell and Mrs. Marilyn McNeil, Negro women who have lived in Newark all their lives.

3. Our findings, based on the examination of the Grand Jury Lists, are as follows:

A. The proportions of Newark residents and non-Newark residents in the Grand Jury Lists from January, 1964 to and including May, 1967, are as follows:

Newark residents	18.62%
Non-Newark residents	81.38%

B. On the basis of addresses of persons listed on the Grand Jury Lists from January, 1966 to and including May, 1967, and with the assistance of the Misses Bell and McNeil, who exhibited considerable knowledge of and familiarity

with Negro or predominantly Negro neighborhoods, and the addresses therein likely to be those of Negro persons, we estimated that the proportions of Negroes and that of whites and other races on the lists are as follows:

Whites and others	91.2%
Negroes	8.8%

C. The proportions of males and females in the Grand Jury Lists from January, 1962 to and including May, 1967 is as follows:

Males	77.8%
Females	22.2%

4. Further, my research reveals the following facts and statistics concerning Newark and Essex County, New Jersey:

A. Current total population:*

Total	100%	100%
White and other	67%	45%
Negro	33%	55%
Male	48%	48%
Female	52%	52%

* These figures based upon official 1960 Census Report and the Report of the New Jersey Conservation and Economic Development Department, July 1, 1966.

B. Approximately 43% of all Essex County residents reside in Newark, New Jersey.

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C. Based upon my own research and with the assistance of Misses Bell and McNeil we estimated the composition of the 12th-16th Grand Juries as follows:

Negro	6.9%
White and Other	93.1%
Male	71.3%
Female	28.7%
Newark residents	23.4%
Non-Newark residents	76.6%

5. On September 11, 1967, at approximately 4:30 P.M., I had the following telephone conversation with Mr. Melvin Howie, Sr., Jury Commissioner of Essex County, New Jersey, concerning the method of selection of grand jurors:

A. Mr. Howie explained that Essex County grand jurors are selected from a grand jury master list composed of between 125 to 300 names which is drawn up and prepared by the Essex County Jury Commissioners.

B. Such lists are prepared and forwarded to the Essex County Clerk three times a year for grand jury terms commencing annually each January, May and September.

C. Mr. Howie stated persons are selected basically through two methods. By one method, names are selected at random from the voters registration list of Essex County. The Commissioner indicated that it is common to select a certain alphabetical portion (eg., A-H or I-R) of the voter's list, choosing every tenth or twentieth name, or thereabouts, and placing it on the grand jury master list. By the second

method, names are solicited from church, civic, labor, corporate or other organizations situated in Essex County, New Jersey. Of the latter source, however, Mr. Howie stated that only a minute portion of persons selected to the master list results from solicitation of organizations and that the major source is the voting registration lists.

D. Further, Mr. Howie stated that the jury commissioner has discretion as to which sources to utilize for the selection of persons for the grand jury master list.

E. The above mentioned sources are used most often because, Mr. Howie states, they provide the most accurate sources of current names and addresses of residents in the community.

F. Those organizations solicited are ones which Mr. Howie, or the other Commissioner, generally has contact with, either through membership or friendship. Mr. Howie noted that several typical organizations solicited might be the Rotary Club, Lions Club, corporate personnel or Kiwanas International.

G. According to Mr. Howie, he was recently urged to solicit an increased number of labor representatives for grand jury duty.

H. Upon selection of such names of persons who might qualify for grand jury duty, questionnaires are mailed to these individuals who, in turn, fill them in and mail them back to the Commissioners. On the basis of the information supplied on the forms, the Commissioners then determine who is, and is not, eligible of those selected to be appointed to the Grand Jury Master List.

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6. On September 8, 1967, at approximately 5:00 P.M., I had the following conversation with the Clerk of the Grand Jury of Essex County, New Jersey, Mr. Caffrey, relating to procedure and expedition of business before the Grand Jury:

A. Mr. Caffrey related that the grand jury, once empanelled, usually sits each business day between the hours of 9 A.M. to as late as 7 P.M., if necessary.

B. It is not unusual for the grand jury to process 25-30 cases per day. That the Clerk further stated that a grand jury, properly functioning, could well handle 100 cases per day, although it could not well process 200 cases per day.

C. According to Mr. Caffrey, a typical case before the grand jury need only take a couple of minutes.

D. Mr. Caffrey further stated, that grand jury sessions are normally closed to public observation, other than the Clerk, a judge, the prosecutor and, if requested, a stenographer.

E. Generally no minutes or record of grand jury proceedings are maintained; that a stenographer does not keep minutes unless the grand jury demands the presence of one; that generally the only time such a demand is made is during controversial cases; and that the reason given, by Mr. Caffrey, for not maintaining a permanent record of grand jury proceedings is because of limited storage space for such files.

7. That all of the above is true to the best of my knowledge, information and belief.

GEORGE CHARLES BRUNO

(Sworn to September 22, 1967.)

Appendix C

AFFIDAVIT OF HENRY DI SUVERO

STATE OF NEW JERSEY,
COUNTY OF ESSEX, } ss.:

I, HENRY DI SUVERO, being of fully age and duly sworn upon my oath, do depose and say:

1. I am and have been since February, 1967, Executive Director of the American Civil Liberties Union of New Jersey. I am a member of the bars of the States of New York and California. From 1965 until February, 1967, I was a staff counsel for the New York Civil Liberties Union.

2. The American Civil Liberties Union is a non-partisan and non-political organization organized for the purpose of defending the individual liberties of all persons and having as a special concern the vindication of rights contained in the Bill of Rights.

3. All the facts, matters and things stated in the complaint are believed in information and belief to be true.

4. As Executive Director of the American Civil Liberties Union of New Jersey, I have recruited approximately twenty attorneys to volunteer their assistance to the Public Defender and have been in contact with these attorneys and have had discussions with them concerning the handling of the so-called "riot" cases.

5. On information and belief, the Public Defender's office created on July 1, 1967, lacks the facilities and organization which is necessary to properly represent approximately 800 clients assigned to said office as a result of the disturb-

ances more fully described in the complaint. Said office, still housed in temporary offices at 1100 Raymond Boulevard in Newark, has only three telephones for eight attorneys. Said personnel and facilities are inadequate to provide more than cursory assistance, if any, to the more than 150 attorneys who have volunteered their services to the Defender's office to assist in the representation of assigned cases. Indeed, as of today, the Defender's office has not provided defense attorneys with any legal materials to assist said attorneys in the defense of their cases.

6. On information and belief, to date, only one motion attacking the composition of the grand jury has been filed on behalf of any of the approximately 850 defendants being represented by the Public Defender. Annexed hereto and made a part hereof are the moving papers and affidavit annexed in *State* v. *Clarence Stanley Reed,* Ind. No. 2459/67, Essex County Court, Law Division. I believe the information and matters set forth therein to be true.

7. On information and belief the grave and serious charges pending against the aforesaid defendants raise many complicated questions of constitutional law unfamiliar to most attorneys who have volunteered to handle said cases. Insufficient time has been accorded these attorneys to properly prepare the defense of said cases due to the accelerated program of prosecutions being carried out by the defendant herein.

Schedule of Trials.

8. On information and belief, the New Jersey Attorney General's office has lent members of its staff to the Essex County Prosecutor to help effectuate the latter's program of speedy trials and mass convictions.

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9. On information and belief the Essex County Prosecutor has consistently opposed any extension of time to defendants' attorneys for the purpose of filing pre-trial motions, or for the purpose of familiarizing themselves with the constitutional issues involved in these cases.

10. On information and belief the Essex County Prosecutor is engaging in the practice of over-charging defendants by adding numerous counts of disorderly person charges and curfew violations charges in order to coerce guilty pleas because he knows that indictments already returned cannot result in successful prosecutions due to lack of evidence.

11. The Essex County Prosecutor has been deliberately advancing all cases arising out of the disturbances in the City of Newark on July 12, 13, 14, 15, and 16, 1967, ahead of any and all other cases in response to the Governor's call for swift and retributive justice.

12. I have read the Complaint and verify that the facts contained therein are true and correct and as to matters alleged on information and belief, they are believed to be true and correct. I make this verification as an attorney for the plaintiffs because the facts alleged in the Complaint, being legal in nature, are more familiar to me than to the plaintiffs therein.

HENRY DI SUVERO

(Sworn to September 22, 1967.)

Appendix C

Affidavit of Harris David

State of New Jersey,
County of Essex, } ss.:

I, Harris David, after being duly sworn do depose and say:

1. I am an attorney representing John William Smith who is a defendant in the Essex County Criminal Court under Indictment numbers 2677-66 and 2678-66.

2. On September 18, 1967, I argued a motion for an extension of time in which to file pre-trial motions and briefs, and for an adjournment of the trial date. The motion prayed for an extension of 30 days in which to file pre-trial motions and for an adjournment of the trial date for a reasonable time thereafter.

3. The request noted that "defendant is preparing at least two pre-trial motions in the instant cases which require extensive investigation and research". It further noted that "said motion will raise important constitutional rights on defendant's behalf and will probably deal with at least six issues."

4. The assistant prosecutor for Essex County opposed the motion on the grounds that the Governor has called for "speedy justice."

5. The Court granted an extension of eleven days to file pre-trial motions and briefs and ordered that defendant be prepared to argue the motions on that day. The trial date was adjourned for two weeks.

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6. On September 12, 1967, I sought a stay in the Essex County Court of the trial in the Newark Municipal Traffic Court of traffic charges against the defendant. The prime basis of the request was that the traffic trials, were relevant to the incidents out of which defendant had been indicted, and that were he tried and convicted, he would receive adverse pre-trial publicity which would prejudice his chance for an impartial trial by jury of the indictments. It was noted that the trial date was set for September 25, 1967.

7. The application was denied and defendant was tried and convicted in the Newark Traffic Court that night.

8. The next day the front page of the Newark Star Ledger carried a large headline about my client reading:

Cabbie gets 60 days; arrest sparked rioting

HARRIS DAVID

(Sworn to September 22, 1967.)

APPENDIX D

Affidavits Submitted to Three Judge District Court at Hearing on October 6, 1967

Affidavit of Earl Harris

State of New Jersey,
County of Essex, } ss.:

I, Earl Harris, being of full age, and duly sworn upon my oath according to law do depose and say:

1. I am a resident of the City of Newark, New Jersey.

2. For many years, I have taken an active part in the community affairs of the Negro community in the City of Newark. I am a former member of the board of trustees of the local chapter of the N.A.A.C.P. and a founding member of the Newark-Essex Chapter of the Congress of Racial Equality. Formerly, I have been an administrative aide to the Mayor of the City of Newark and the South Ward aide to former Congressman, George Wallhauser, and have held elective office as a member of the Essex County Board of Freeholders. I am presently active in PTA and various other community organizations.

3. As a result of my many public activities, I have met and talked with many Negro people in Newark. I am able to state that, due to the massive criminal prosecutions of Negroes arrested during the summer's disturbances, there is widespread fear in the community of becoming involved in peaceful programs and demonstrations directed at problems which exist in Newark. There is also a widespread feeling that the law is being used only against the Negro

community. People have lost all confidence in the legal processes. They feel that the City and the Essex County Prosecutor are making an example of the Negro community, showing the community what will happen to them if they try to make known their concerns and grievances.

That the Negro people in Newark are very definitely afraid of threats, intimidation and reprisals is clear in an examination of programs begun before the arrests of over a thousand black people.

THE RECALL PETITION

4. A group of residents in Newark got together after the July disturbances to organize a drive to lawfully recall Mayor Hugh J. Addonizio. I was named as a coordinator of the recall-petition drive. It was the consensus of the group that we should attempt to recall the Mayor rather than get a petition to change the form of City government. It was our opinion that Mayor Addonizio was a bad mayor and that he was completely unresponsive to the needs of the Negro community. Robert Curvin, former chairman of the Newark-Essex Chapter of CORE acquired the petition for recall. We proceeded to organize during the month of August. Initially, the solicitors encountered no difficulty in getting signatures for the recall. Hundreds of black citizens expressed their dissatisfaction with the policies of the Mayor. But, immediately after the news stories broke about criminal proceedings against the people arrested during the July disturbances, we found people more reluctant to sign the recall petitions. Our survey indicated fear—fear on the part of the black community having their names appear on a petition which might be available for the police. I personally talked to a number of people who expressed to me fear of signing the petition because of possible reprisals by the City Administration.

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EDUCATION; THE MEDICAL SCHOOL; K-9 DOGS

5. This past winter there was a coalition formed of various civil rights leaders and organizations to protest the inequities that existed in the Negro community. Among these were the lack of decent housing, job opportunities, decent education, and mistreatment by the police. In the area of decent housing, we found that the Mayor of the City of Newark attempted to create further chaos by having the New Jersey Medical and Dental College erected on 160 acres in the heart of the Central Ward. This school meant that approximately 22,000 people, the majority of them Negro, would eventually be forced out of the City because of the lack of decent housing available to Negroes and Puerto Ricans. We organized a group called the Committee against Negro and Puerto Rican Removal and fought this issue through the Housing and Urban Development in Washington, D. C., the Regional Office of HUD, in Philadelphia and the Planning Board of the City of Newark. It was pointed out to us by various attorneys that the mayor had acted before the fact in entering into an agreement with the Board of Trustees of the New Jersey Medical and Dental College before the Planning Board's declaration of blight. We were able to encourage a large segment of the community to participate in registering their protest against the medical and Dental College at the Planning Board hearings. In fact, the hearing dragged on so long until the Planning Board refused to hear any additional complaints from the community.

6. Our next endeavor was the matter of the Board of Education attempting to appoint Councilman James T. Callaghan to the position of Secretary to the Newark Board of Education under the direction of the Mayor of

the City of Newark who publicly stated in the press that he was for Callaghan for this position, in spite of the fact that Mr. Callaghan was not equipped educationally to administer responsibly the position of Secretary to the Newark Board of Education. It was pointed out to us by researchers that Mr. Callaghan at best was a high school graduate. This we seriously doubted. Several groups of ministers, business people, including the President of Prudential Insurance Company, the President of the Mutual Benefit Life Insurance Company and other responsible businessmen, personally visited with the Mayor attempting to persuade him to reconsider his public pledge of supporting Mr. Callaghan and not Mr. Wilber Parker, a Negro CPA, and the first such in the State of New Jersey, for the position of Secretary to the Board. The Negro community exhibited their wholehearted support of Mr. Parker by appearing at the Board of Education meetings which were transferred from the Board of Education building at 31 Green Street, Newark, to the larger meeting room of the City Council Chambers. The people continued to register their protest at subsequent meetings until we finally blocked the appointment of Mr. Callaghan.

7. Since the criminal proceedings of hundreds of Newark residents appeared in the daily press, there has been a drop-off of interest in such demonstrations. Our coalition attempted to encourage the black community to appear at the City Council meetings to register their protest against the Council's passing a resolution to purchase K-9 Dogs. The majority of people in the black community that we talked to who participated in the Callaghan-Parker issue and the medical school protest were afraid to come out to the City Council meetings to protest the K-9 Dogs because of the face-to-face confrontation with a large

number of the off-duty policemen of the City of Newark who were present at the City Council meetings advocating the purchase of dogs. This is in spite of massive Negro dissent to the purchase of the dogs. There is fear in the Negro community—fear of reprisals; fear from threats by the police; fear of intimidation; fear to participate in an orderly expression against man's inhumanities towards man.

8. In addition to the foregoing, there is fear on the part of the Negro community to peacefully deal with grievances against the police by filing complaints with the Prosecutor's Office. People have read in the papers that such attempts to express grievances will be met with by civil suits for millions of dollars filed against the complainants.

9. All of these things are instilling in the minds of Newark's Negro citizens the feeling that any attempt to right wrongs through legal channels will only result in harm to themselves.

EARL HARRIS

(Sworn to October 5, 1967.)

Appendix D

AFFIDAVIT OF ROBERT CURVIN

STATE OF NEW JERSEY,
COUNTY OF ESSEX, } ss.:

I, ROBERT CURVIN, being of full age, according to law, upon my oath do depose and say:

1. I live at 106 Huntington Terrace, Newark, New Jersey.

2. I am a member of the Newark-Essex Chapter of the Congress of Racial Equality and served as chairman of that organization for 2 years, 1964-66. I have a Master's degree in social work with a special field in community organizing from Rutgers University. Graduate School of Social Work. Presently I am employed as Director of the Rutgers University Community Action Training Program.

3. CORE is an organization dedicated to advancing rights and opportunities of black minorities so that they will enjoy and exercise the rights and privileges presently enjoyed and exercised by white citizens.

4. In my capacity both as member and chairman, I have participated in numerous activities seeking to obtain the organizational aims of CORE. In this connection, I have helped organize and have participated in numerous demonstrations and other forms of peaceful public protest.

5. Immediately prior to the civil disturbances which occurred in Newark, New Jersey between July 12-17, 1967, I was active in organizing members of my race in publicly and peacefully protesting the appointment of an unqualified white candidate for the post of Secretary to the Board of

Education over the candidacy of a qualified Negro to that post. During this campaign, and others prior to the July disturbances, I noticed no significant reluctance by members of the black community to participate and express their grievances as guaranteed by the First Amendment to the United States Constitution.

6. I have followed the newspaper reports of the program of prosecution of those arrested during the said disorders and have conferred with many people pertaining to this program.

7. On information and belief, the defendant in this action, commencing on July 17, 1967, has deliberately accelerated the prosecutions of those arrested during said disturbances ahead of his normal trial calendar. I have spoken with a large number of Negro residents of Newark and these persons are well aware of the prosecutive program commenced by the defendant. This program, it is believed, is designed and intended to the purpose of massively intimidating and thus preventing Negroes from effectively exercising their First Amendment rights. As a result, Negro citizens of the community have lost confidence in Newark's law enforcement officers, knowing that said officers can not be relied upon to offer the same kind of protection rendered to white persons in the peaceful exercise of their constitutional rights. Instead of peacefully protesting legitimate grievances, as was done prior to July, 1967, Negro citizens of the community have appreciably refrained from, and presently refused to participate in such activity rather than bear the probably consequences of retaliation of said officials.

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8. Commencing on or about August 1, 1967; together with other residents of Newark, I launched a petition compaign seeking the recall of the Mayor of the City of Newark.

9. In my professional judgment, as one trained and experienced in the field of community organization, members of the Negro community of the City of Newark are much less prone to exercise their federally protected constitutional rights to protest their grievances after the civil disorders of July 12 to 17, 1967, than they were before that period. One of the prime reasons why said persons are less prone to act is because they fear entanglement or contact with law enforcement officials including the defendant herein, and that such contact it is felt will result in reprisals and retaliation by said officials and said defendant.

ROBERT CURVIN

(Sworn to October 5, 1967.)

AFFIDAVIT OF ALBERT BLACK

STATE OF NEW JERSEY,
COUNTY OF ESSEX, } ss.:

I, ALBERT BLACK, being duly sworn upon my oath, do depose and say:

1. I reside at 42 Eckert Avenue in the City of Newark.

2. I am a member of the Negro race and I have resided in the City of Newark for the past six years.

Appendix D

3. During the course of my residence in Newark I have been active in numerous social and cultural groups and one of my prime activities has been to secure to all citizens the full enjoyment of political and civil rights and in particular to secure these rights to members of the Negro race.

4. Since February 1966 to the present date, I have been Chairman of the Newark Human Rights Commission, a public agency of the City of Newark, dedicated to the protection of human rights of the citizens of Newark.

5. In my capacity as Chairman, I have had occasion to travel extensively in the City of Newark and to discuss and investigate the many complaints which I receive and which allege the deprivation of these rights.

6. I was present in the City of Newark during the civil disturbances which occurred commencing on or about July 12, 1967 and extending through July 17, 1967.

7. During said period I was constantly either in the streets, in police precincts or in other public places.

8. During said period, among other things, I witnessed many criminal acts performed by law enforcement officials; all of whom were white. Some of these acts consisted of indiscriminate shooting of firearms into Negro homes; others consisted of incident to the detention of Negro citizens. In particular I witnessed police brutality being visited in police precinct stations upon Negro citizens who were arrested during said disturbances.

9. I made my observations and recollections available to the office of the New Jersey State Police and the Newark

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Police Department, the Mayor of the City of Newark and the Director of the Newark Police Department for the purpose of providing them with factual information for bringing criminal proceedings against the perpetrators of said criminal acts.

10. I also requested said officials to institute said proceedings and have offered my services to collect further information in connection with said incidents.

11. No request for further assistance has been received by me from said officials.

12. On information and belief no criminal proceedings have been instituted by the Essex County Prosecutors Office as a result of the information I supplied to the aforementioned officials and indeed no proceedings at all have been instituted by said office against any white persons for crimes committed against Negroes during said disturbances.

13. From newspaper reports and my daily discussions with public officials I am aware that the defendant herein adopted a novel practice of submitting all said civil disturbance cases to grand juries, immediately upon the termination of said disturbances.

14. Said procedure has effectively and on a scale never seen before in Essex County, cut off important procedural rights, such as the right to a preliminary hearing.

15. I am also aware that the defendant has accelerated these cases in his prosecutive calendar and whereas normally a period of 6 to 8 months elapses before cases are

brought to trial, these cases were commenced on or about September 25, 1967.

16. I have discussed with many members of the Negro community the impact of this prosecutive program. The feeling is widespread that the selective enforcement of the laws, together with the accelerated prosecutive program that is being conducted, is being carried out for the purpose and is having the effect of deterring Negro citizens from freely exercising their constitutionally protected rights.

17. Said prosecutive program is being conducted, it is generally thought, in a retributive manner "to show" the Negro community that they must steer wide and clear of any contact with law enforcement officials, otherwise they will be caught up into the prosecutive dragnet.

18. As a result I have noticed a considerable decline of peaceful protest and activity in the Negro community.

19. Many Negro persons since July 17, 1967, have told me that although they feel stronger than ever that they are victims of considerable prejudicial societal oppression, they are now afraid to engage in further overt political and social activity such as peacefully demonstrating or speaking at public assemblies because they fear such action will cause them to be arrested and mercilessly prosecuted.

20. The feeling is widespread in the Negro community that wholesale arrests took place during said civil disturbances as referred to hereinbefore and that said arrests were made without regard to evidence to support such

charges and that the procedure adopted of swiftly presenting such cases to a grand juries composed of a vast predominance of white jurors and their indictments in assembly line fashion when there was no evidence to support such charges was done to terrorize the Negro community.

21. As a result of the defendant's publicly stated policy of "downgrading" such charges after arrest and indictment, I believe that said widespread feeling is fully justified.

22. Unless said prosecutive program is stopped and unless full procedural and constitutional rights are guaranteed to the defendants charged in these cases, not only those defendants, but the entire Negro community of the City of Newark will be irreparably injured. Not only will the particular defendants, large though their numbers might be, forever be injured by being tried by unconstitutionally composed grand and petit juries and during an atmosphere of vengeance and vindictiveness, but the entire Negro community will be deterred from engaging for a long period of time (to their immeasurable damage), in the exercise of protected and fundamental rights under the United States Constitution.

ALBERT BLACK

(Sworn to October 5, 1967.)

Appendix D

Affidavit of James Hooper

State of New Jersey,
County of Essex, } ss.:

I, James Hooper, of full age, being duly sworn upon my oath according to law deposes and says:

1. I reside at 148 Goldsmith Avenue in the City of Newark, County of Essex, and State of New Jersey.

2. Since 1965, I have been a member of the Congress of Racial Equality, and since 1966, I have been the chairman of the Newark-Essex Chapter of Core. In my capacity as chairman and as a member, I have engaged in numerous activities with the black community of Newark and Essex County for the purpose of securing to them and to myself the full rights and privileges of citizens of the United States. I have participated in and helped organize numerous public protests in the City of Newark for the purpose of securing these rights.

3. I am fully aware of the civil disturbances which occurred in the City of Newark during the period of July 12-17, 1967, as I was in the City at that time.

4. During said period, on numerous occasions, I saw law enforcement officials, all of whom were white visiting bodily harm on black citizens of the City of Newark. In no instance did I see or witness any said white law enforcement officials apprehended because of the illegal criminal actions that they were performing.

5. I have been following the newspaper reports concerning the prosecutorial program adopted by the defendant in

connection with those arrested during said disturbances. I have also been in personal contact with several of those persons who were arrested and with counsel to said persons.

6. On information and belief, the defendant herein has adopted a prosecutorial program which has accelerated the cases arising out of these disturbances ahead of those cases ready on the trial calendar prior to July 12.

7. On or about August 1, 1967, together with other persons in the City of Newark, I helped to organize and direct a campaign to recall the Mayor of the City of Newark. In this activity I have had occasion since that time to converse with literally hundreds of black residents of the City of Newark. Many of these persons have told me that they would not assist in the recall campaign although they endorse my efforts wholeheartedly. Said persons explained to me that they did not want to in any way put themselves in a position where they might possibly come into contact with law enforcement officials because they were afraid that they would be swept into the prosecutorial dragnet which is currently enforced, and which is directed at the black residents of the City of Newark.

Other persons said that although they also wholeheartedly endorsed the recall campaign, that they would not affix their signatures to said petitions because they were afraid of being identified as opponents of the present City Administration, and because as a result of said identification, they might become the object of police and law enforcement harrassment.

8. I am convinced that as a result of said conversations, the black community in the City of Newark has become and

is presently intimidated by the massive prosecutorial program being conducted by the defendant. Indeed, said community is so intimidated that numerous members of said group will not participate in the exercise of federally protected constitutional rights because they fear becoming entangled with the law enforcement officials of the City of Newark in the County of Essex. In comparing the extent of the intimidation at the present time to that which existed before July 12, in my judgment I can say that people are more afraid now of participating in legitimate political protest at the present time than they were before that period.

9. As a result of the failure of the defendant herein to initiate any prosecution against any white law enforcement officials, and because of criminal acts perpetrated upon the black community during the period of July 12-17, said police officers have been encouraged to continue their lawless conduct.

10. Indeed, such lawlessness, as a result of the defendant's selective application of the law, has achieved such proportions that on September 6, inside the Council Chambers of the City of Newark, a white uniformed police officer in full view of 250 persons, accosted and assaulted a black resident of the City of Newark who had just finished addressing, in a rational manner, the City Council and had voiced his opposition to a proposal to purchase K-9 Dogs, for the police department. Said assault was continued by the police officer into the corridor and was terminated only when 8 or 9 other officers finally intervened. The police officers, instead of being apprehended for his lawless conduct, was ordered by his superior to return to his post.

JAMES HOOPER

(Sworn to October 5, 1967.)

Appendix D

Affidavit of Dr. Walter J. Dick

State of New Jersey,
County of Essex, } ss.:

Dr. Walter J. Dick of full age, being duly sworn according to law, upon his oath deposes and says:

1. Since 1966 I have been on the faculty of Rutgers University teaching applied and mathematical statistics and am currently Assistant Professor of Statistics of Rutgers University, at its Statistics Center at New Brunswick, New Jersey.

2. I received the degree of A.B. from Gettysburg College in 1960; M.S. from Michigan State University in mathematical statistics in 1964; M.S. in applied statistics at Rutgers University in 1965; and Ph.D. in applied and mathematical statistics at Rutgers University in May, 1967.

3. From 1953 to 1957 I was in military service in the Air Force Security Service, doing intelligence work in various areas and attaining the rank of staff sergeant. From 1960 to 1962 I was employed by Eastman Kodak Company, Rochester, New York, as a statistician. Since then, in addition to my academic duties and studies, I have performed research and consulting work as a graduate assistant to faculty members engaged in statistical research and analysis for the United States and for the State of New Jersey. I have worked in a statistical capacity on two projects of the New Jersey Department of Health, an anti-coronary research project conducted at St. Vincent's Hospital in Montclair, New Jersey, and a radium research project at West Orange, New Jersey, funded by the Atomic Energy Commission.

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4. I have been furnished with the following figures by George Charles Bruno as estimates for 1966 supplied to him by the Chief of Research and Statistics in the State Department of Conservation and Economic Development and as found in an official report of the New Jersey Department of Conservation and Economic Development, July 1966 and the official 1960 U. S. Census Report:

	Essex County	*Newark*
Total population	954,310	398,000
Negroes	283,700	224,600
Percentage of Negroes to total population	29.7%	56.4%

5. I have also been advised by Mr. Bruno that, according to information furnished to him, two members of the Fifteenth Grand Jury, 1966 Term, were Negroes, and one member of the Sixteenth Grand Jury, 1966 Term, was a Negro.

6. Based upon statistical analysis and computation it is my opinion that:

a. In a county in which Negroes comprise 29.7% of the population, the likelihood due to chance alone that there will be 3 Negroes in a group of 46 persons, is less than 3 out of 10,000.

b. In such a county, the likelihood due to chance alone that there will be 2 Negroes in a group of 23 persons is less than 15 in 1,000.

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c. In such a county, the likelihood due to chance alone that there will be 1 Negro in a group of 23 persons is less than 4 out of 1,000.

7. I have examined the addresses of Grand Juries Fifteen and Sixteen. Of the 46 Grand jurors, 11 have Newark addresses. I have been informed by Mr. Bruno that he and Mr. Bruno has been advised that 1 out of these 11 was a Negro. In a city in which 56.4% of the population is Negro, the likelihood due to chance alone that 1 person in a group of 11 is a Negro is less than 1 out of 1,000.

8. I have been informed by Mr. Bruno that according to figures in the 1960 U. S. Census Report of Essex County, N. J. has a female population of 52%. I have also been supplied by Mr. Bruno certain figures indicating the number of males and females appearing on the Grand Jury Master lists for the years 1962-1967, excluding September 1967. In such a county with such a population, the likelihood of observing 22%, or less, female members of the grand jury venire, due to chance alone, is less than 1 out of 1,000,000.

Composition of Grand Jury Master Lists: 1962-1967

Male	3891	78%
Female	1097	22%
Total	4988	

9. I have been supplied by Mr. Bruno certain figures indicating the number of females and males appearing on the May, 1967 Grand Jury Master List from which the Fifteenth and Sixteenth Grand Juries were selected. In such

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a County, with such a population, the likelihood of observing 24%, or less, female members of the grand jury venire is less than 1 out of 100,000.

Composition of Grand Jury Master Lists: May 1967

Male	226	76%
Female	74	24%
Total	300	

10. I have been supplied by Mr. Bruno certain figures indicating the number of Newark, New Jersey residents appearing on the Grand Jury Master Lists for the period 1964-67, excluding September, 1967. In such a county, with such a population, the likelihood of observing 19.4%, or less, Newark residents on a grand jury venire list containing 3,186 is less than 1 out of 100,000.

Composition of Grand Jury Master Lists: January 1964—May, 1967

Newark Residents	617	19.4%
Non-Newark Residents of Essex County	2,569	80.6%
	3,186	

11. I have been supplied by Mr. Bruno certain figures indicating the number of Newark residents appearing on the May, 1967 Grand Jury Master List from which the 15th and 16th Grand Juries were selected. In such a County, with such a population, the likelihood of observing 19% or less, Newark residents on a grand jury venire of 300 names is less than 1 out of 100,000.

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Composition of Grand Jury Master List: May, 1967

Newark Residents	57	19%
Non-Newark Residents from Essex County	243	81%
Total	300	

Further, in such a county, 99 times out of 100 a venire list of 300 names should include between 103 (34.4%) and 146 (49.0%) Newark residents.

12. Based on the population estimates as shown in paragraph 4, above, in such a County, 99 times out of 100 a venire list of 300 names should include between:

(a) 69 (22.9%) to 109 (36.5%) Negroes from all of Essex County, of which

(b) 51 (17.2%) to 89 (29.8%) Negroes should be from the City of Newark.

WALTER J. DICK

(Sworn to October 5, 1967.)

Appendix D

Affidavit of Robert Douglas Broege

State of New Jersey,
County of Essex, } ss.:

I, Robert Douglas Broege, being of full age, duly sworn according to the law, upon my oath do depose and say:

1. I am a first year law student at Rutgers, the State University, 180 University Avenue, Newark, New Jersey.

I reside at 51 Clifton Avenue, Newark, New Jersey.

2. On Wednesday, October 4, 1967, and Thursday, October 5, 1967, I assisted counsel in the preparation of the case of *Wynn* v. *Byrne*. This entailed the examination of a petit jury list in the County Clerk's vault in the Hall of Records of Essex County in Newark, New Jersey.

3. The petit jury list examined was for the session beginning on January 3, 1967. I examined 6169 names on the list that certified 6191. This was due to the absence of the first page which should have included 22 names. I examined the names to determine the number of males and females, and the number of people residing in Newark and the number residing outside of Newark in Essex County.

4. The examination yielded the following results:

a) Out of 6169 names examined, 4800 were male and 1369 were female. This results in a proportion of male, 77.5% and female, 22.5%.

b) Out of 6169 names examined, 1327 lived in Newark and 4842 lived outside of Newark in Essex County. This results in a proportion of 21.5% living in Newark as opposed to 78.5% living outside of Newark in Essex County.

The results above are valid to the best of my knowledge, information and ability.

Robert Douglas Broege

(Sworn to October 5, 1967.)

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Affidavit of Alison Raphael

State of New Jersey,
County of Essex, } ss.:

Alison Raphael, of full age, being duly sworn according to law, upon her oath deposes and says:

1. I am a first year student at Rutgers, The State University, School of Law, 180 University Avenue, Newark, New Jersey.

2. I live at 50 James Street, Newark, N. J. On Wednesday, October 4, I assisted counsel in the preparation of the above-captioned case.

3. I worked in the County Clerk's vault at the Hall of Records, in Newark. I examined the Petit Jury Master list which was signed on 7/11/66 for use in the session beginning 9/12/66.

4. I examined the list with regard to the number of male and female names on the list and with regard to the number of people residing in Newark, as opposed to those residing elsewhere in Essex County.

5. This examination yielded the following results:

A. I found that out of a total of 4,919 names on the Petit Jury List, 1,128 were females and 3,791 were males.

B. This results in a percentage of 22.9% females on the Petit Jury List.

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C. I found that out of a total number of 4,919 names on the Petit Jury List, 1,162 were Newark residents and 3,757 were non-Newark residents.

D. This results in a percentage of 23.6% Newark residents on the Petit Jury List.

ALISON RAPHAEL

(Sworn to October 5, 1967.)

AFFIDAVIT OF MARC RICHARD KADISH

STATE OF NEW JERSEY,
COUNTY OF ESSEX, } ss.:

I, MARC RICHARD KADISH, being of full age, being duly sworn according to law, upon my oath, do depose and say:

1. I am a third year law student at Rutgers Law School, 180 University Avenue, Newark, New Jeresy. I reside at 9 Greenwood Avenue, West Orange, New Jersey.

2. On Wednesday, October 4, 1967, I assisted counsel in the preparation of the case of *Wynn* v. *Byrne* by examining the Petit Jury Master List for the session which began in May, 1967.

3. I examined the list in the office of the Clerk of the Essex County Court for the session which began in May, 1967, to determine the number of males and females on the list, and to determine the number of people who resided in Newark as opposed to those living elsewhere in Essex County.

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4. This examination yielded the following results:

a) Out of a total of 3,485 names on the May, 1967, Session of the petit jury list, 800 were female and 2,685 were male.

b) This results in a percentage of 22.9 females on the Petit Jury List.

c) Out of a total of 3,485 names on the May, 1967, Jury Session, 786 were Newark residents and 2,699 were non-Newark residents.

d) This results in a percentage of 22.6 Newark residents on the Petit Jury List.

All of the above is true to the best of my knowledge, information and belief.

MARC RICHARD KADISH

(Sworn to October 5, 1967.)

AFFIDAVIT OF GEORGE CHARLES BRUNO

STATE OF NEW JERSEY,
COUNTY OF ESSEX, } ss.:

I, GEORGE CHARLES BRUNO, of full age, being duly sworn according to law, upon my oath, depose and say:

1. I reside at 351 Broad Street, Newark, New Jersey. I am employed by the Newark Legal Services Project, 114 Branford Place, Newark, New Jersey, where I am serving

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as a Reginald Heber Smith Community Lawyer Fellow, associated with the University of Pennsylvania—I hold the degree of Bachelor of Laws from the National Law Center of the George Washington University.

2. On October 5, 1967, I collated the three lists of Petit Jurors that were supplied by Alison Raphael, Robert Broege, and Marc Kadish.

3. This collation revealed:

a) That of a toal of *14,573* names on the Petit Jury Lists for the past three sessions, *3,297* were female and *11,276* were male.

b) This resulted in a percentage of *77.4%* males and *22.6%* females.

c) That *3,275* were Newark residents, and *11,298* were non-Newark residents.

d) This results in a percentage of *22.5%* Newark residents on the lists, with *77.5%* being non-Newark residents.

4. In summary, the examination resulted in the following figures and percentages:

Total of Names examined on the Petit Jury Master Lists for September, 1966; January, 1967; and May, 1967	14,573	100 %
Male	11,276	77.4%
Female	3,297	22.6%
Newark	3,275	22.5%
Non-Newark	11,298	77.5%

GEORGE CHARLES BRUNO

(Sworn to October 5, 1967.)

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Affidavit of Rita L. Bender

State of New Jersey,
County of Essex, } ss.:

Rita L. Bender, of full age, being duly sworn according to law, upon her oath deposes and says:

1. I am a third-year law student at Rutgers—The State University, School of Law, and I am assisting counsel in the preparation of the above captioned case. On Wednesday, October 4, 1967, I made several telephone calls to various publications to obtain information as to the circulation of those publications.

2. I telephoned the Circulation Department of the *Newark News* and spoke with Miss Lee. She gave me the following statistics as to average circulation of that newspaper for the year 1966:

Average daily circulation	282,957.
Average Sunday circulation	423,253.

These figures are compiled by the Audit Bureau of the newspaper each year.

3. I spoke wih Mr. William Dempsey, Circulation Director of the *Newark Star Ledger*, who gave me the following information for the year ending September 30, 1966:

Average daily circulation	243,302
Average Sunday circulation	409,801.

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4. Miss Crotty, secretary to the Media Services Manager of the *New York Times*, gave me the following statistics for the six months ending March 31, 1967, which is the most recent period available:

Average daily circulation in Essex County	18,530
Average Sunday circulation in Essex County	32,481.

5. I spoke with Miss Patricia Daly in the Circulation Department of *Time Magazine*. She informed me that the average circulation in Essex County in March 1967 was 5,689.

6. Miss Brody, Research Associate at *Life Magazine*, informed me that the total circulation in Essex County on March 17, 1967, was 52,271.

7. All of the above is true to the best of my knowledge, information and belief.

RITA L. BENDER

(Sworn to October 4, 1967.)

APPENDIX E

Affidavits Submitted to United States District Court on Appellants' Application for Stay Pending Appeal

AFFIDAVIT OF STEPHEN R. BING
ESSEX COUNTY COURT
LAW DIVISION—CRIMINAL
Indictment No. 2309-66, etc.

STATE OF NEW JERSEY

vs.

IVORY KELLY, *et als.*
Defendants.

STEPHEN R. BING, being duly sworn according to law, upon his oath deposes and says:

1. I am an Attorney at Law of the State of New Jersey.

2. I am assigned counsel for the defendants, Ivory Kelly, Indictment No. 2309-66, Theo Betha, Indictment No. 2334-66, and Harvey Sims, Indictment No. 2374-66.

3. The aforementioned defendants are being charged with various criminal offenses arising out of the Newark civil disturbances which occurred in Newark, New Jersey, between July 12, 1967 and July 17, 1967.

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4. In the course of my representation of my clients, I deemed it necessary to file a motion to dismiss the indictments on several grounds. The moving papers are attached hereto and marked Appendix A.

5. On the return date of said motion, Friday, October 6, 1967, the Assignment Judge of Essex County ordered that my motion and the similar motions filed on behalf of some eighty-five other defendants be consolidated for hearing. The Order of consolidation is attached hereto and marked Appendix B.

6. The Assignment Judge further adjourned the hearing on the motion and ordered that there would be no stay of trials pending the outcome of said motion. The Order is attached hereto and marked Appendix C.

7. I thereupon filed a Notice of Motion for Leave to Appeal to the Appellate Division of the State of New Jersey. The moving papers and brief are attached hereto and marked Appendix D.

8. I also applied for a temporary stay of the prosecutions to the Honorable Mark A. Sullivan, pending the decision on the motion for leave to appeal. This application was denied. The Order is attached hereto and marked Appendix E.

9. On October 16, 1967, said motion for Leave to Appeal was denied by the Appellate Division, the Honorable Mark A. Sullivan presiding. The Order is attached hereto and marked Appendix F.

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10. I have not joined in any other legal action to seek relief for my clients other than noted in this affidavit.

11. As of October 19, 1967, hearing on said motion to dismiss the indictments was still in progress. No formal order has been entered staying the trials of any person indicted whose attorney has participated in this motion.

STEPHEN R. BING

(Sworn to October 23, 1967.)

APPENDIX A, ANNEXED TO AFFIDAVIT OF STEPHEN R. BING

ESSEX COUNTY COURT

LAW DIVISION—CRIMINAL

INDICTMENT No. 2610-66, ETC.

STATE OF NEW JERSEY,

Plaintiff,

vs.

IVORY KELLY, *et als.*,

Defendants.

Appendix E

Notice of Motion

To: Honorable Brendan T. Byrne
Prosecutor of Essex County
Essex County Court House
Newark, New Jersey

Sir:

Please Take Notice That on Friday, the 6th day of October, 1967, at 2 o'clock in the afternoon, the undersigned, counsel for the above named defendant, shall move before the Honorable James R. Giuliano, Assignment Judge of Essex County, to dismiss the above Indictment on the ground that it was returned in abridgement of defendant's constitutional right to procedural and substantive due process in the following particulars:

1. In the extraordinary manner in which the Grand Jury which indicted the defendant was selected, impaneled, and in the subsequent functioning thereof, and;

2. In that the Grand Jury, collectively and individually violated the oath set forth in N.J.S. 2A: 73-3 to "diligently inquire and true presentment make" of the evidential material "brought before it concerning the charge against the defendant, and;

3. In that the Grand Jury, collectively and individually, violated the oath set forth in N.J.S. 2A: 73-3 to "present no one through envy, hatred or malice" in returning the Indictment against the defendant, and;

4. In that the Assignment Judge made no effort to determine if bias or prejudice was present in any

member of the said Grand Jury prior to their being sworn or instructed, and;

5. In that there was a systematic and deliberate exclusion of females and Negroes in the selection of the said Grand Jury which indicted the defendant, and;

6. In that the Grand Jury which indicted the defendant was non-representative of a cross section of the community because the jury commissioners in the selection thereof did not have "regard to the just distribution of jury service among those persons qualified therefor, in the various wards and municipalities" of Essex County, in violation of N.J.S. 2A:70-1, and;

7. In that no stenographic minutes were taken of the Grand Jury proceeding which led to the indictment of the defendant, and thereby denying defendant effective assistance of counsel, and;

8. In that, by reason of the haste in which the Indictment was returned, defendant was denied an opportunity to fully prepare an adequate defense to the pending charge.

At the hearing of this Motion, Counsel shall rely upon oral testimony, affidavits to be filed, and such other matters and things which may be brought before the Court.

STEPHEN R. BING
Attorney for Defendant

Dated: September 20, 1967

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APPENDIX B, ANNEXED TO AFFIDAVIT OF STEPHEN R. BING
ESSEX COUNTY COURT
LAW DIVISION—CRIMINAL
INDICTMENT No. 2309-66, ETC.

STATE OF NEW JERSEY,
Plaintiff,

vs.

IVORY KELLY, *et als.*,
Defendants.

ORDER CONSOLIDATING ARGUMENT OF MOTIONS TO DISMISS INDICTMENTS

It appearing to the Court that upwards of eighty-five (85) motions to dismiss indictments have been filed and made returnable for Friday, October 6, 1967; and it further appearing to the Court that common quesions of law and fact pertain to each of said motions; and it further appearing that the attorneys for the various defendants on whose behalf said motions were filed have stipulated that the same be argued by Stephen R. Bing, Esq. and Hymen B. Mintz, Esq. and the Court having considered said stipulation attached hereto, and for good cause shown, it is hereupon on this 10th day of October, 1967,

ORDERED, that all of said motions be joined for the purpose of argument with the motions and brief filed by the said Stephen R. Bing, Esq., and Hymen B. Mintz, Esq.

JAMES R. GIULIANO
A.J.S.C.

I hereby consent to the form of the within order.

HON. BRENDAN T. BYRNE
Prosecutor of Essex County

Appendix E

APPENDIX C. ANNEXED TO AFFIDAVIT OF STEPHEN R. BING
ESSEX COUNTY COURT
LAW DIVISION—CRIMINAL
INDICTMENT NO. 2309-66, ETC.

STATE OF NEW JERSEY,

Plaintiff,

vs.

IVORY KELLY, *et als.*,

Defendants.

ORDER

This matter being opened to the Court on Friday, the 6th day of October, 1967, on the applications of the attorneys for the various defendants more fully noted in a Stipulation annexed hereto in connection with motions to dismiss the indictments herein, and the Court presently having heard several aspects of said motion and it appearing that the remaining points contained therein are scheduled for hearing on Monday the 16th day of October, 1967, and it further appearing to the Court that the trials of the defendants involved in said motions are scheduled for October 11, 1967 and thereafter, and it further appearing to the Court that the attorneys for the various defendants have requested an adjournment of said trials pending the disposition of the motions to dismiss the indictments; it is on this 10th day of October, 1967,

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ORDERED, that the applications of the attorneys representing the various defendants bringing the motions to dismiss the indictments for a stay of the trials pending the disposition of said motions is hereby denied.

JAMES R. GIULIANO
A.J.S.C.

I hereby consent to the within Order as to form.

HON. BRENDAN T. BYRNE
Essex County Prosecutor
by /s/ BARRY H. EVENCHICK

Appendix E

APPENDIX E, ANNEXED TO AFFIDAVIT OF STEPHEN R. BING

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

STATE OF NEW JERSEY

Respondent,

vs.

IVORY KELLY, *et als.*,

Defendants-Appellants.

ORDER

This matter being opened to the Court on the application of the attorneys for various defendants as set forth in the schedule attached hereto, for an Order granting a temporary stay of certain trials pending the disposition of motions to dismiss indictments made prior to trial by the defendants herein; it further appearing that an adjournment was ordered by the Essex County Court, Law Division, Honorable James R. Giuliano, on October 6, 1967; and it further appearing that the application of the attorneys representing the various defendants on their motions to dismiss the indictments for a stay of the trials pending the disposition of said motions was denied by the aforesaid order of the court; and this Court having considered the application for a stay of the trials involved herein pending the disposition of defendants-appellants' motion for leave to appeal; it is on this 11th day of October, 1967,

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ORDERED, that the stay of the trials involving these defendants herein scheduled to begin on October 11, 1967, and thereafter, pending disposition of defendants' motion for leave to appeal, be and the same is hereby denied; and it is further

ORDERED, that the Prosecutor of Essex County is to answer the Brief and papers on the Notice of Motion for Leave to Appeal within five (5) days of the date of this Order.

MARK A. SULLIVAN,
J.A.D.

I hereby consent to the within Order as to form.

HON. BRENDAN T. BYRNE,
Essex County Prosecutor,
By: /s/ BARRY H. EVENCHICK,
Asst. Pros.

Appendix E

APPENDIX F, ANNEXED TO AFFIDAVIT OF STEPHEN R. BING

MOTIONS ORDER ON PETITIONS
SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. AM-35-67

MOTION NO. M-72-67

BEFORE PART D

STATE OF NEW JERSEY

vs.

IVORY KELLY, et al.

Moving Papers Filed—October 11, 1967

Answering Papers Filed—October 13, 1967

Date Submitted to Court—October 13, 1967

Date Argued—October 13, 1967

Date Decided—October 16, 1967

This matter having been duly presented to the Court, it is hereby ORDERED as follows:

Motion for leave to appeal—Denied.

• • •

Original Filed—October 17, 1967

MARK A. SULLIVAN
S. J. A. D.

Witness, the Honorable Mark A. Sullivan, Senior Judge of Part D, Superior Court of New Jersey, Appellate Division, this 16th day of October, 1967.

MORTIMER G. NEWMAN, JR.
Clerk of the Superior Court

Appendix E

Affidavit of Reverend Horace Sharper

State of New Jersey,
County of Essex, } ss.:

I, Reverend Horace Sharper, being of full age, and duly sworn upon my oath according to law do depose and say:

1. I am one of the plaintiffs, sub-class two.

2. I am a resident of Newark and for seven years I have been the pastor of the Abyssinian Baptist Church located at 224 West Kinney Street, Newark, New Jersey. The congregation of said church consists of approximately 1100 persons, almost all, if not all of whom are Negroes and also residents of the city of Newark. In my capacity as pastor I come into daily contact with numerous Negro residents of Newark and I counsel and in other ways assist such persons in the course of discharging my duties.

3. I also engage in other public activities in said City. I participate in a American Baptist Convention, and the Greater Newark Council of Churches and am chairman of the Police Practices Committee of the Committee of Concern, a broadly based group of civic minded citizens in the city of Newark.

4. In my several capacities I have been in contact with a wide cross-section of the Negro community ranging from civil rights activist, high school students who have dropped out of school, workingmen, housewives, professionals, businessmen, and other ministers.

5. I have had occasion to discuss with members of each of these groups their understanding of the criminal prose-

cutions of Negroes arrested during the summer's disturbances.

6. These persons I have talked to understand that the prosecution of those arrested is being treated in a special manner by both the defendant and the judges of the Essex County Courts. It is their feeling that the prosecutor is rushing these cases to trial in order to capitalize on many factors, the most important being the widescale publicity received by those arrested.

7. At the same time these same persons are aware that certain white police officers, members of the Newark Police Department, have been charged with more serious crimes involving an auto theft ring and as has been reported in the press, (See Ex. A and B annexed hereto) these persons although indicted on November 3, 1966, have not yet been tried.

8. The failure to bring these persons to trial while Negroes are being rushed to trial for lesser offenses underscores to the Negro community the discriminatory method by which the defendant is proceeding.

9. As a result of their understanding of this prosecutive program, numerous persons with whom I have been previously associated with in the exercise of First Amendment rights, namely in demonstrating, assembling, petitioning for a redress of grievances and the like, are now afraid of becoming involved in such activities because they are afraid that they will come into contact with law enforcement officials as a result of such conduct and then be swept into the defendant's prosecutive program.

Appendix E

10. As a result of such inactivity, my people, the Negro community of Newark, is being irreparably injured.

11. Although there are major social problems facing said community, such as the dislocation of numerous persons through urban renewal projects, the purchase of police dogs by the Police Department, and the publicizing of merchants engaging in fraudulent consumer practices, members of the Negro community of Newark, whereas in the past, would have engaged in forms of peaceful protest, now have been intimidated into inactivity.

REVEREND HORACE SHARPER

(Sworn to October 26, 1967.)

Appendix E

Affidavit of Jeff Fogel

State of New Jersey,
County of Essex, } ss.:

I, Jeff Fogel, being of full age, and duly sworn upon my oath according to law do deposes and say:

1. I am a resident of Belleville, New Jersey, and a second year law student at Rutgers University School of Law, Newark, New Jersey.

2. On information supplied to me from Charles Camps, Clerk of the County Court, Law Division of Essex County, I have been told the following concerning the indictments returned by the Fifteenth and Sixteenth Grand Juries of Essex County after July 12, 1967, and as of Wednesday, October 18, 1967:

(a) 524 indictments were returned against 801 defendants; some indictments named multiple defendants.

(b) Since September 25, thirty trials have been held with 22 judgments of conviction and 8 judgments of acquittal.

(c) Since said time 11 persons have retracted not guilty pleas and entered guilty pleas.

(d) Of the 801 defendants indicted, 260 of said defendants have been subsequently charged or "downgraded" with a disorderly person offense.

(e) Of said 260 persons, forty have pleaded guilty.

3. Thus on the aforesaid facts, it appears that there have been 81 dispositions of the 801 cases.

/s/ Jeff Fogel
Jeff Fogel

(Sworn to October 26, 1967.)

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DISM

ON TO

MISS

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 2 1968
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1967

No. 977

BARRY WYNN, *et al.*,

Appellants,

—against—

JOSEPH P. LORDI, as Prosecutor for the County of Essex, State of New Jersey,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

MOTION TO DISMISS

THOMAS P. FORD, JR.,
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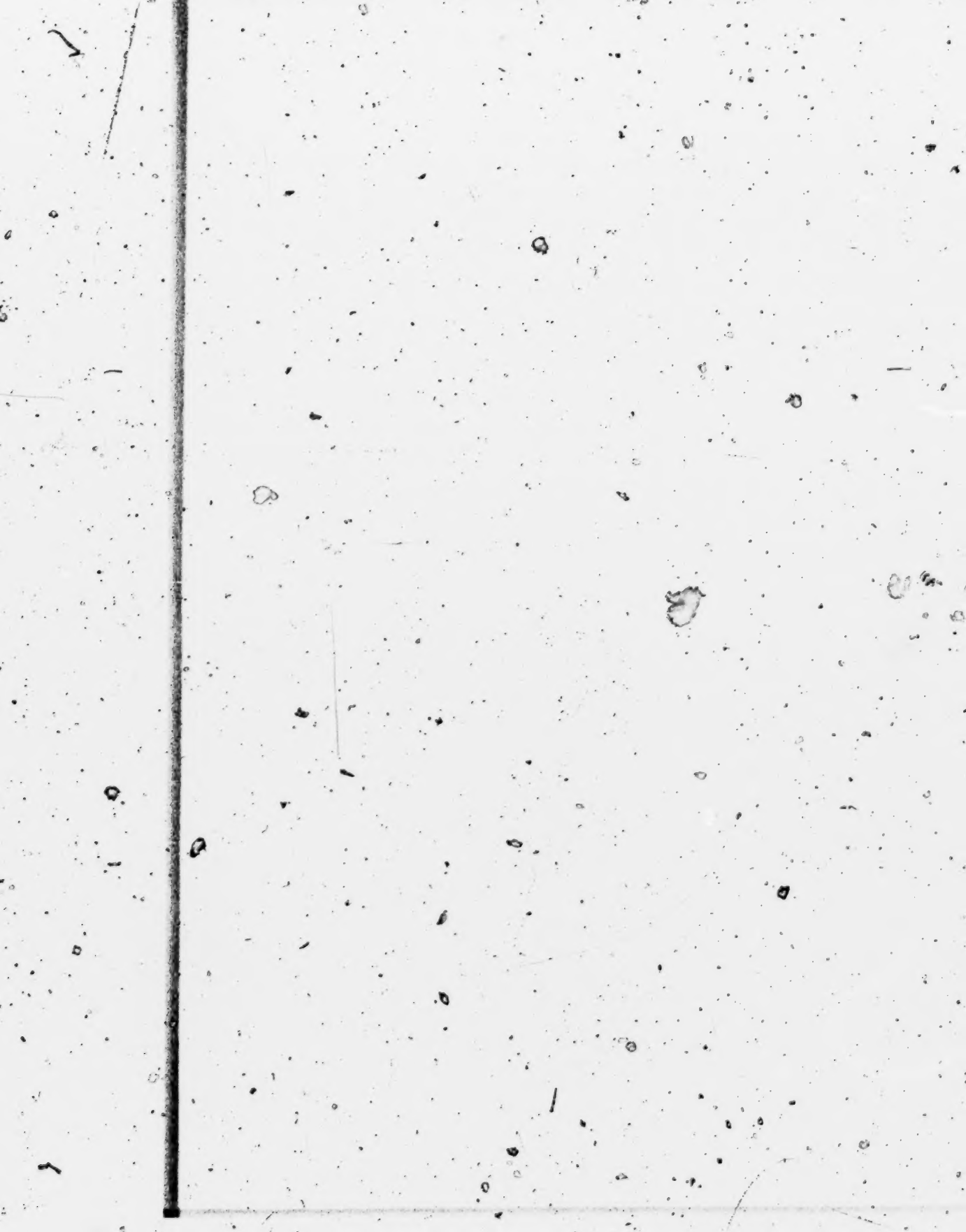

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Supreme Court of the United States

OCTOBER TERM, 1967

No. 977

BARRY WYNN, *et al.*,

Appellants,

—against—

JOSEPH P. LORDI, as Prosecutor for the County of Essex, State of New Jersey,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Object of Motion

By this motion, appellee respectfully requests this Court to dismiss the appeal, *sub judice*, for lack of jurisdiction and for mootness. Alternatively, it is requested that the order of the court below be affirmed on the ground that the underlying issues were fully considered and are so unsubstantial as to require no further argument.

Questions Presented

1. Since appellants were never threatened with enforcement of any State statute alleged to have been unconsti-

tutional, was it not erroneous for a three-judge court to have been convened?

2. Is not this "appeal" substantially moot in view of the fact that all but two criminal defendants have already been tried in the New Jersey courts?

3. Are not the underlying issues which were the subject of the District Court's order so unsubstantial as not to require further argument?

Statement of Facts

On September 22, 1967, appellants filed a complaint in the United States District Court for the District of New Jersey. In essence, the complaint requested that a three-judge court be convened, that a declaratory judgment be issued declaring N.J.S. 2A:73-3 to be unconstitutional and that a permanent injunction be granted restraining the appellee[1] from proceeding with the prosecution of any persons whose indictments were returned by the Essex County Grand Jury between the dates of July 17 and July 27, 1967.

On September 22, 1967, an order was filed by the Honorable Reynier J. Wortendyke, Jr., of the United States District Court, which order denied appellants' application for a temporary restraining order against the appellee and set a hearing date on appellants' motion for an interlocutory injunction for October 6, 1967, at 10:00 a.m.

Pursuant to an *ex parte* application before Judge Wortendyke on October 2, 1967, appellants obtained an order for the taking of depositions within the first 20 days after

---

[1] The original defendant in this case was Brendan T. Byrne, then the Prosecutor of Essex County. On January 10, 1968 Joseph P. Lordi became the Prosecutor of Essex County, and, pursuant to instructions by the Clerk of this Court, his name was substituted as appellee.

the filing of the complaint (Rule 26 of the Federal Rules of Civil Procedure). Thereafter, appellee was served with a notice for the taking of the depositions of 16 persons at 10:00 a.m. on October 4, 1967. In accordance with an application of the appellee which was made on October 4, 1967, Judge Wortendyke modified his original order of October 2, 1967, to provide that only the deposition of the appellee might be taken. The order further observed that the deposition of the appellee had been taken on October 3, 1967. Finally, the order directed that the subpoenas which had issued pursuant to the original order for depositions be quashed.

On October 6, 1967, a hearing was held before a special three-judge panel in the United States District Court for the District of New Jersey. After the presentation of legal arguments by counsel, the court reserved decision and, on October 10, 1967, an order was filed denying appellants' motion for a preliminary injunction and staying all other proceedings in the cause "until after the final conclusion of said state court proceedings." Following an unsuccessful attempt by appellants to obtain a stay of the aforementioned order, a "notice of appeal" was filed in the District Court of New Jersey.

ARGUMENT

POINT I

Since the three-judge District Court was improperly convened, there is no jurisdictional basis for appeal pursuant to 28 U.S.C. §1253.

In a memorandum of law submitted in advance of the hearing below, appellants asserted that their case had to be heard by a three-judge court pursuant to 28 U.S.C. §2281 which provides:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such state in the enforcement or execution of such statute . . . shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefore is heard and determined by a district court of three judges under section 2284 of this title."

The sole State statute relied upon by appellants as the basis for a three-judge panel was N.J.S. 2A:73-3.[2] This statute, which prescribes the oath taken by grand jurors of New Jersey, is alleged by appellants to be unconstitutional on its face. The fact is, however, that the present appellee is not charged with the obligation of enforcing the oath statute nor is he seeking to enforce that statute. Rather, his duty is to enforce the substantive criminal statutes of New Jersey. Appellants are not the subject of any enforcement attempt pertaining to N.J.S. 2A:73-3. It is clear that under 28 U.S.C. 2281, a three-judge panel is required only when a party is seeking to enjoin or restrain the enforcement or execution of a state statute by an officer of the state or by an administrative board or commission. Appellee took the position in the court below and maintains the position here that a three-judge panel was improperly convened. Compare *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965) where a three-judge panel was convened to consider a challenge to the enforcement of a prosecution

[2] In a supplemental memorandum filed with the District Court after the hearing, appellants noted that they also challenged the constitutionality of N.J.S. 2A:69-1.1. This statute is virtually identical to N.J.S. 2A:73-3 except that the latter pertains to grand jurors and the former to petit jurors.

in the State of Louisiana for alleged violations of a subversive activities control law. The factual distinction between *Dombrowski* and the present case is manifest.

The complete absence of a proper basis for the convening of the special district court panel makes it apparent that there is no right of appeal to this Court under 28 *U.S.C.* §1253. Despite the assertion of the appellants to the contrary, there is no proper jurisdictional ground for this Court to entertain an appeal. *Moody v. Flowers*, 387 U. S. 97 (1967).

POINT II

Since all but two criminal defendants designated as appellants in this matter have already been tried in the New Jersey courts, this "appeal" from a denial of injunctive relief is substantially moot.

Of the 13 persons named as appellants in this suit, two are not criminal defendants. One is awaiting trial in the Essex County Court, and one is presently in the midst of a pre-trial motion to dismiss his indictment (a motion which asserts essentially the same grounds as the pleadings in the present case). Three appellants were convicted on the charges set forth in the indictments against them, and two other appellants were convicted of lesser offenses than those originally charged in the indictments (the indictments against the latter two have been placed on the dismissal list in the Essex County Court). One appellant has entered a plea of guilty to a lesser charge than that set forth in the indictment, and three appellants have been tried and acquitted.

The facts set forth herein suggest that injunctive relief against the trial of the persons named as appellants would

be inappropriate. Presumably, any person who has been convicted has the opportunity, as of right, to pursue the appellate channels in New Jersey. Insofar as can be determined, no appellant has completed a state appeal as of this time, although several have entered notices of appeal.

The facts and statistics contained here belie any general claim that juries in Essex County are predisposed to convict those arrested during the civil disturbances in Newark. Of the six persons who have received jury trials on indictments, three have been acquitted. This percentage tends to be a higher percentage than might reasonably be expected in other types of criminal trials. And too, it should be observed that while appellants would have this Court believe that they have no available remedy in the State court system of New Jersey, the fact is they have resorted to that same State court system and are resorting to it at this time. Each and every ground set forth in the pleadings filed in the United States District Court on September 22, 1967 is the subject of a motion presently going on (previously mentioned herein) before the Assignment Judge of Essex County. This motion, although in the name of just one defendant, is actually a consolidated motion involving more than 80 defendants. In light of this, the decision of the court below to stay any further proceedings seems to have been a proper one. In any event, the question of whether or not injunctive relief was properly denied is now made moot because of the trials which have already occurred.

POINT III

The underlying issues which were the subject of the District Court's order have been fully explored and are so unsubstantial as not to require further argument.

Despite the fact that the appellants herein have submitted numerous affidavits, newspaper articles, sociological reports, etc., there is no indication that they have ever set forth a substantial federal issue of the caliber that would properly have required the convening of a three-judge court or the caliber that would give this Court jurisdiction in a direct appeal. They have consistently argued in conclusionary and general terms and have consistently attempted to place themselves in the position of persons who have been constitutionally aggrieved—this despite the absence of a substantial legal basis for such claim.

It was argued by appellee below and is urged here that the appellants lack standing to seek a preliminary injunction against the prosecution of criminal trials in Essex County. Since it appears that the motion for a preliminary injunction is based upon the alleged attempt to enforce an unconstitutional statute of New Jersey (N.J.S. 2A:73-3), appellee notes that said statute pertains to jurors. Those persons are the only ones who might, in an appropriate instance, have standing to challenge the law. The matter of standing is traditionally subjected to a strict and narrow interpretation by the Supreme Court of the United States. Thus in *Tileston* v. *Ullman*, 318 U. S. 44 (1943), this Court refused to permit the plaintiff, who was seeking a declaratory judgment, to represent others in that application. It was feared that if such an application were permitted, the "case or controversy" provision of the United States Constitution would become "blurred." The *Tileston* case can be contrasted with *Griswold* v. *Connecticut*,

381 U. S. 479 (1965), where there was no doubt that plaintiffs had standing by virtue of the fact that because of their respective positions they would be aiders and abettors and therefore criminally liable in a prosecution against the users of contraceptives in the State of Connecticut. Here, a case or controversy does not exist with respect to any statute of the State of New Jersey.

It was also argued below and is again asserted here that the appellants are not truly a class as counsel suggest. There is a conspicuous absence of any information in any of the papers filed by the appellants to support the naked assertion that there is a class of persons so numerous that a joinder of all its members would be impracticable or that there are questions of law or fact common to such a class or that the claims or defenses of representative parties are typical of the claims or defenses of the class. And significantly, there is nothing to support the contention that the present appellants will fairly and adequately protect the interests of such a class, assuming that one exists. The prerequisites which are set forth in Rule 23(a) of the Federal Rules of Criminal Procedure are necessary for a class action but not necessarily sufficient. See 3 *Moore's Federal Practice*, p. 3401 (Supp. 1966).

To the extent that a three-judge panel was correctly convened, it is argued by appellee that its order should be affirmed by this Court without further argument. Indeed, the lower court, having been apprised of the facts, determined to deny a preliminary injunction and stay all further proceedings pending the outcome of the State court proceedings. In view of that fact that there was no substantial showing that the federal tribunal was critical to the preservation of justice or constitutional rights, the court's decision appears to have been proper. These appellants are in no wise similarly situated to the appellant

in *Dombrowski* v. *Pfisler*, 380 U. S. 479 (1965). In *Dombrowski*, a three-judge panel was convened to consider a challenge to the enforcement of a prosecution in the State of Louisiana for alleged violations of a subversive activities control law. *Dombrowski* was clearly in the position of needing the assistance of the federal courts to avoid an injustice in the state court system. But here, the appellants have never demonstrated the existence of any State statute which threatens their security or which threatens to deprive them of their constitutional rights.

Appellants rely upon the decision of this Court in *Zwickler* v. *Koota*, 36 *U. S. L. Week*, 41 (decided December 5, 1967) for the proposition that a three-judge court was properly convened and for the additional proposition that the court below erred in abstaining from determining the claims which were asserted. *Zwickler* is distinguishable in that it involved a person who faced the prospect of state prosecution for a violation of an election statute regarding the printing of handbills. It had been claimed that the New York statute was overbroad on its face and that it should have been the subject of a declaratory judgment in the federal court. This Court agreed that the district court had erred in invoking the abstention doctrine. It was iterated that the abstention doctrine is inappropriate for cases such as the one presented in *Zwickler* where statutes are justifiably attacked on their face as abridging free expression. In the case *sub judice*, the court below had no obligation to decide the merits of the declaratory request because of the fact that the statute involved was not threatening those persons who were seeking to challenge it. Appellant urges that when this Court has examined the record below, it will, in effect, see that what the appellants are really seeking is an advisory opinion as to the constitutionality of grand and petit jury selection in New Jersey. This Court has been served with numerous affi-

davits by sociologists and statisticians and with charts and sociological reports and newspaper articles; however, none of these things truly relates to a proper basis for federal intervention. Appellants' claim that the state prosecutions have had a "chilling effect" on their freedom of speech. This phrase is totally unsupported by anything stronger than appellants' own rhetoric. There is no issue involved in any of the criminal prosecutions in New Jersey that cannot be appropriately preserved for consideration on appeal.

CONCLUSION

For the reasons expressed herein it is respectfully urged that this Court dismiss the appeal in the present case.

Respectfully submitted,

THOMAS P. FORD, JR.,
First Assistant Prosecutor,
Attorney for Appellee.

BARRY H. EVENCHICK,
Assistant Prosecutor,
Of Counsel and on the Motion.

SUPREME COURT, U. S.

FILED

FEB 23 1968

JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1967

No. 977

BARRY WYNN, CHARLES McCRAY, EVERETT LEROI JONES, JOHN WILLIAM SMITH, GEORGE JOHNSON, ALEXANDER HOLLOWAY, ELBERT ODOM, WALTER ROGER SPELLER, WOODROW A. HOWARD, CHARLES NATHANIEL VAN DER VEER, CHARLES TOOMER, REVEREND HORACE SHARPER, REVEREND JAMES W. PARROTT,

Appellants,

—against—

JOSEPH P. LORDI, as Prosecutor for the County of Essex, State of New Jersey,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

ANSWER TO MOTION TO DISMISS

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Supreme Court of the United States

OCTOBER TERM, 1967

No. 977

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—against—

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Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

ANSWER TO MOTION TO DISMISS

POINT I

The District Court's abstention from determining claims of wholesale denial of federal constitutional rights in state criminal proceedings was improper.

Appellee seeks to justify the District Court's abstention as "proper" on the grounds that (1) appellants have available state court remedies for the vindication of their federal claims (Motion to Dismiss p. 6); (2) that "there was

no substantial showing that the federal tribunal was critical to the preservation of justice on constitutional rights" (*Id.* p. 8); and (3) that "no appellant has completed a state appeal at this time" (*Id.* p. 6) and that "[t]here is no issue involved in any of the criminal prosecutions in New Jersey that cannot be appropriately preserved for consideration on appeal". Significantly none of these reasons are supported by case citation to the decisions of this Court. Indeed they fly squarely in the face of the recent decisions of this Court, concerning the proper duty and function of a federal court in adjudicating federal claims. They reflect if anything, the decisions of this Court in the area of federal removal or federal habeas corpus—and not those of abstention in vindication of federal constitutional rights asserted under the Civil Rights Act.

It is clear that "relief under the Civil Right Act may not be defeated because relief was not first sought under state law which provided a remedy." *McNeese* v. *Board of Education*, 373 U. S. 668, 671 (1963); *Damico* v. *California*, 88 S. Ct. 526 (1967) (*per curiam*).

Indeed, as this Court said in *McNeese*:

> "We would defeat those purposes [of the Civil Rights Act] if we held that assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court" 373 U. S. at 672.

As explained in *Zwickler* v. *Koota*, 88 S. Ct. 391 (1967), determination of the federal claim is the rule and abstention the rare exception: "The judge-made doctrine of abstention . . . sanctions such escape [from the determination of federal claims] only in narrowly limited 'special circumstances'." *Id.* at 395.

There is no reason to await the termination of state court proceedings as the District Court ordered. In the language of *McNeese*, there is:

> "in the present case no underlying issue of state law controlling this litigation. The right[s] alleged [are] as plainly federal in origin and nature as those vindicated in *Brown* v. *Board of Education* . . . nor [are] the federal right[s] in any way entangled in a skein of state law that must be untangled before the federal case can proceed." *McNeese* v. *Board of Education*, 373 U. S. 668, 674 (1963).

The availability or exhaustion of state remedies does not provide the "special circumstances" required to justify abstention.

Appellees' suggestion that a "substantial showing" must be made that the action of a federal court "was critical to the preservation of justice or constitutional rights" (Motion to Dismiss p. 8) in order to establish a right to federal relief is unfounded after *Zwickler*, where this Court said "questions of abstention and of injunctive relief are not the same". 88 S. Ct. at 399. At this point in the case it is the duty of the District Court to determine whether plaintiff's can demonstrate the necessary injury to federal rights to justify equitable relief. The Court cannot shun that responsibility by deciding to abstain from determining the federal claims.

POINT II

Since the three judge court was properly convened to determine the constitutionality of a state statute appellants have a valid jurisdictional basis for appeal to this Court pursuant to 28 U. S. C. §1253.

A. *Appellants Have Standing to Challenge the Juror's Oath.*

Appellee contends that appellants lack standing to challenge the juror's oath, claiming that jurors alone have standing to challenge it (Motion to Dismiss p. 7). Appellee misreads our position.

Appellants do not base their claim on the rights of jurors or prospective jurors. Rather, they complain that the oaths have denied their personal rights: (1) by excluding from grand and petit jury service those persons who are members, or who fear they may be members, of the organizations proscribed by the oath, (2) by denying plaintiffs the right to be indicted and tried in accordance with the law of land, and (3) by prejudicing jurors through the inflammatory, unconstitutional language of the oath (Appellants' Appendix p. 8a).

It is well established that juries must be selected without the systematic exclusion of any group, whether it be economic, social, religious, racial, political or geographic. *E.g., Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, 220 (1946). It is also clear defendants in a criminal case have, "the right to be tried under what has been determined to be the law of the land." *State* v. *Madison*, 240 Md. 265, 213 A. 2d 880 (1965). (See Jurisdictional Statement Footnote,

p. 30.) Appellants have as much standing to challenge this oath as they would have to challenge a statute requiring the exclusion of Negroes from the juries.

Appellee's reliance on *Tileston* v. *Ullman*, 318 U. S. 44 (1943) is misplaced (Motion to Dismiss p. 7). In that case a physician prayed for a declaratory judgment as to whether statutes prohibiting the dissemination of birth control information were unconstitutional. The plaintiff asserted the constitutional rights of his patients who were not parties to the action, but did not, in contrast to appellants in the instant case, assert that he had been denied any rights. It is submitted that even if appellants herein predicated their claim on the juror's rights, that appellants having been directly prejudiced by the oath and subjected to criminal indictments and prosecution, have standing to challenge it. *Barrows* v. *Jackson*, 346 U. S. 249 (1953); *Griswold* v. *Connecticut*, 381 U. S. 479 (1965); *NAACP* v. *Alabama*, 357 U. S. 449 (1958).

B. *Appellants' Attack on the Juror's Oath Is Within the Language of 28 U. S. C. §2281.*

Appellee contends that "appellants are not the subject of any enforcement attempt pertaining to N. J. S. A. 2A:73-3" and therefore cannot sue to enjoin its "enforcement or execution" pursuant to 28 U. S. C. §2281 (Motion to Dismiss p. 4).

28 U. S. C. §2281 provides for a three judge district court where a party seeks:

> "An interlocutory or permanent injunction restraining the *enforcement, operation* or *execution* of any State statute restraining the action of an officer of such

state in the enforcement or execution of such statute . . . " (emphasis supplied).

As noted in Section A, *supra,* it is clear that the oaths involved have been executed and presently *operate* to deny plaintiffs their constitutional rights. Appellee's contention that appellants are not the subject of any "enforcement attempt" pertaining to the oath, ignores the language of §2281 which permits injunctions to restrain the "operation or execution" of any State statute.

Moreover, said oath is being enforced against appellants, in that appellee is proceeding upon indictments issued from grand juries rendered constitutionally infirm by the grand jury oath, to trial before petit juries also rendered infirm by the petit jury oath. The application of the oath to deny appellants' rights is an enforcement of the oath against them.

Appellee also argues that he is not charged with the obligation of enforcing the oath statute (Motion to Dismiss p. 4). However, by prosecuting indictments returned pursuant to the oath, he is the state officer, unlike the Attorney General in *Moody* v. *Flowers,* 387 U. S. 97, 102 (1967), whose action is the effective means of the enforcement or execution of the challenged statute.

Moreover, appellee is the only state official against whom plaintiffs could obtain the appropriate relief on voiding the indictments.

Appellants could not restrain the State Court which administered the oath to the grand juries because the oaths were administered in June, 1967, and the issue as to the administration of the oaths is therefore moot. The only

way to repair the harm done at that time is now to enjoin the prosecutor from proceeding to compound the injury. Unlike in *Wilentz* v. *Sovereign Camp,* 306 U. S. 573, 581 (1939) appellee's presence is necessary to prevent the operation of the challenged statute.

By enjoining prosecution by appellee this Court would enjoin the operation of the oath. It is the clear intent of Congress as set forth in 28 U. S. C. §2281 that said action could not be taken by a single federal judge.

POINT III

No facts exist that justify dismissal for mootness.

Appellee contends that the appeal is "substantially moot" because only two of the thirteen appellants await trial (Motion to Dismiss p. 5). If for no other reason the fact two of the appellants await trial removes any doubt that the appeal presents a live case or controversy for this Court to consider and decide. The appeal is either moot or it is alive. There is no judicial doctrine of "substantial" mootness and indeed, appellee cites no authority to support this ingenious and novel contention.

In addition appellants sue as representatives of a class consisting of Negro citizens arrested on July 12-16 in the City of Newark who face criminal prosecutions in the State courts (Jurisdictional Statement, Appendix p. 3a). Appellants have been advised by the Clerk of the Essex County Courts that as of February 9, 1968 approximately two hundred members of said class are awaiting prosecution by appellee.

Although it is arguable that a case is moot after a party serves his sentence, there is no doubt that a controversy

exists so long as there remains a sentence to be served. See, *e.g.*, *St. Pierre* v. *United States*, 319 U. S. 41, 42 (1943); *Jacobs* v. *United States*, 388 U. S. 431 (1967); *cf. United States* v. *Morgan*, 346 U. S. 502, 512-13 (1954); *Jones* v. *Cunningham*, 371 U. S. 236 (1963). Indeed appellee contends in seeking to justify the District Court's abstention, that the State criminal cases are very much alive and wending their way through the State courts (Motion to Dismiss pp. 6, 10).

The considerations underlying a proper determination of abstention and a proper determination of mootness are very different, and it is respectfully submitted, if cases are alive for the determination of abstention, then certainly they cannot be considered dead for mootness purposes.

Appellee in contending the instant case is "substantially moot", argues that injunctive relief "would be inappropriate" because state criminal appeals have not been completed (Motion to Dismiss pp. 5-6). Considerations of the appropriateness of abstention have nothing to do with supporting a claim of mootness. Considerations such as comity are distinct from the determination as to whether effective equity relief can be rendered. See, *McNeese* v. *Board of Education*, 373 U. S. 668, 672 (1963); *Zwickler* v. *Koota*, 88 S. Ct. 391 (1967); *Damico* v. *California*, 88 S. Ct. 526 (1967).

The claim of mootness is invalid so long as there is subject matter upon which the judgment of this Court, or the subsequent judgment of the court below can effectually operate. *Brownlow* v. *Schwartz*, 261 U. S. 216, 217 (1923); *Richardson* v. *McChesney*, 218 U. S. 487, 492 (1910). The pendency of State appellate proceedings as well as the

pendency of approximately two hundred trials provides the subject matter upon which a judgment can effectively be rendered.*

CONCLUSION

For the reasons submitted herein and in the Jurisdictional Statement appellants pray that this Court take jurisdiction of this appeal.

Respectfully submitted,

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* The consequences of ruling that a federal case may become moot because the trial stage of state criminal proceedings has been completed are dangerously far-reaching. If this Court should hold that the federal anti-injunction statute, 28 U. S. C. § 2283, is not a bar to relief under 42 U. S. C. § 1983, see, *Cameron* v. *Johnson*, 262 F. Supp. 873 (S. D. Miss. 1966), *prob. juris. noted*, 389 U. S. 809 (1967), and appellee herein wins a dismissal on the basis of mootness, then in effect the states will be able to foreclose access to the federal courts simply by mechanically expediting their trial procedures.

PER CURIAM

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

WYNN ET AL. *v.* BYRNE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

No. 977. Decided March 4, 1968.

PER CURIAM.

The judgment of the United States District Court for the District of New Jersey is vacated and the cause is remanded to that court for further proceedings. *Moody* v. *Flowers*, 387 U. S. 97, at 104.

MR. JUSTICE BLACK would affirm the judgment.